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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., and MARK E. LIQUORI,

Petitioners,

v.

EUGENIE PARNAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTION PRESENTED

Whether an award of punitive damages which is disproportionate to the alleged offense for which it was imposed and which amounts to 15% of the Petitioners' stipulated net worth violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners Americana Hotels, Inc., Flagship International, Inc. and Mark E. Liquori, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Hawaii entered in this proceeding on August 17, 1988. Americana Hotels, Inc. was the managing partner of, and Flagship International, Inc. operated the Ala Moana Hotel during the relevant time period. Respondent Eugenie Parnar was employed at the Ala Moana Hotel.*

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners herein disclose the following: At the time the cause of action giving rise to this litigation occurred, the Ala Moana Hotel Co., a Hawaiian partnership comprised of Dillingham Company, Flagship International, Inc. and Americana Hotels, Inc. owned the Ala Moana Hotel. Americana Hotels, Inc. was wholly owned by Flagship International, Inc. which was in turn wholly owned by American Airlines, Inc.

Neither Americana Hotels, Inc. nor Flagship International, Inc. had any publicly held subsidiaries or affiliates when the cause of action arose.

In 1980, Americana Hotels, Inc. sold its interest in the Ala Moana Hotel to American Airlines, Inc. and American Airlines and Flagship International, Inc. sold their interests in the Hotel to Pick-Pacific Corporation, a wholly owned subsidiary of Pick Hotels, Corporation. As part of that or those transactions, American Airlines assumed financial responsibility for the judgment against Petitioners.

American Airlines, Inc. had and has no publicly held subsidiaries or affiliates. In 1982, AMR Corp. was created as a holding company. American Airlines, Inc. is wholly owned by AMR Corp. Flagship International, Inc. was transferred to AMR Corp. in 1982 and was subsequently sold and dissolved.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

OPINIONS BELOW

The Opinion of the Supreme Court of Hawaii is unreported but is included within the Appendix for Petitioners submitted herein, commencing at page 1a. A prior Opinion of the Supreme Court of Hawaii was reported at 652 P.2d 625 (Hawaii 1982) and is included within the Appendix for Petitioners, commencing at page 19a.

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on August 17, 1988 (Appendix for Petitioners, commencing at page 1a). A Motion for Reconsideration was filed on August 26, 1988 and was denied on September 2, 1988 (Appendix for Petitioners, commencing at page 34a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. Amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the issue of whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution prohibits awards of excessive punitive damages in civil actions. The Court had this issue before it in *Bankers Life and Casualty Company v. Crenshaw*, 108 S. Ct. 1645 (1988), and heard argument on the issue in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), but did not decide the issue in either case. In both cases, the Court noted that the issue was an important one and should be resolved in the proper case. It is necessary in this case for the Court to decide the substantial constitutional issue which it has recognized as one that should be addressed.

I. Facts Relevant to the Constitutional Questions Presented

Eugenie Parnar (hereinafter "Respondent") was employed at the Ala Moana Hotel beginning on August 16, 1972. Over a period of three years she was secretary to four controllers. In March of 1975, Mark Liquori was hired as the Controller and the Respondent stayed on as

his secretary. Respondent was discharged on October 24, 1975. This action was commenced on October 24, 1977 by Respondent who, in a six count complaint, alleged that Petitioners Americana Hotels, Inc. (hereinafter the "Americana"), Flagship International, Inc. (hereinafter the "Flagship"), Mark E. Liquori (hereinafter "Liquori") and unknown persons conspired to and did wrongfully terminate her in order to prevent her from testifying in connection with a Justice Department antitrust investigation.

Petitioners filed a Motion for Summary Judgment on September 25, 1979. The trial court granted Summary Judgment on five counts of the Complaint but, in order to permit Parnar to conduct additional discovery, retained jurisdiction over the first count in which the Respondent alleged she had been wrongfully discharged. On July 30, 1980, the Petitioners moved for Summary Judgment on the wrongful discharge count on the ground that Hawaii had not recognized a cause of action for wrongful termination of an employee-at-will. That motion was granted on August 26, 1980 and Parnar appealed to the Supreme Court of Hawaii. The court reversed the trial court concluding that modification of the employment-at-will doctrine, as previously interpreted and applied in Hawaiian courts, was appropriate. The court, therefore, created an exception to the employment-at-will doctrine holding that "an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982) (hereinafter "*Parnar I*") (Appendix for Petitioners, commencing at 19a). Thus, the court remanded the case for disposition on the merits.

On remand, a jury concluded that Respondent was terminated in violation of public policy and awarded her $300,000 for actual damages, $275,000 for emotional dis-

tress and $1,500,000 in punitive damages. The $1.5 million punitive damages award amounts to 15% of Petitioners' stipulated net worth. Thereafter, Petitioners filed a Motion For A New Trial and a Motion For Judgment Notwithstanding The Verdict. Both motions were denied on August 13, 1987.

II. Presentation of the Federal Question

On August 18, 1987, Petitioners filed a Notice of Appeal in the Supreme Court of Hawaii. In their Opening Brief on Appeal, *inter alia*, the Petitioners argued that the award of punitive damages was excessive and violated the Eighth Amendment to the United States Constitution which prohibits imposition of excesssive fines. Specifically, the Petitioners stated that "[t]he imposition of excessive and unreasonable punitive damages violates Defendants' Constitutional right against excessive fines. Constitution of the State of Hawaii, Section 12, United States Constitution, Eighth Amendment." The constitutional issue was also discussed during oral argument before the Supreme Court of Hawaii.

On August 17, 1988, the Supreme Court of Hawaii affirmed the decision of the trial court without discussing the Petitioners' constitutional arguments (Appendix for Petitioners commencing at 1a). However, Judge Nakamura, in dissent, addressed the constitutional issue and concluded that the award of punitive damages violated the Constitution of the United States and should be reversed. Following receipt of the decision of the Supreme Court of Hawaii, the Petitioners filed a Motion to Stay Enforcement of the Final Judgment pending a decision by the Court upon this Petition for A Writ of Certiorari. A Stay of Enforcement of the punitive damages portion of the jury award was granted on September 21, 1988. Thereafter, Respondent filed a Motion to Vacate the Partial Stay of Enforcement, but that motion was denied on October 3, 1988.

REASONS FOR GRANTING THE WRIT

I. The Issue Of Whether The Excessive Fines Clause Of The Eighth Amendment Applies To Punitive Damages Awarded In Civil Actions Is A Substantial Federal Question Which Should Be Resolved By The Court.

A. *The Court Has Acknowledged That The Issue Presented Is Substantial And Should Be Resolved In The Proper Case.*

The issue raised in this Petition has been before this Court on five occasions in the last two years. The Court has not decided it but has characterized the question as raising "important issues which, in an appropriate setting, must be resolved . . . ." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 828-29 (1986).[1] In *Bankers Life v. Crenshaw*, 108 S. Ct. 1645 (1988), the Court again characterized the issue of whether the Excessive Fines Clause limits punitive damages awards in civil cases as "a question of some moment and difficulty. . . ." 108 S. Ct. at 1651. In *Mobile Dodge, Inc. v. Alford*, 108 S. Ct. 2008 (1988), the issue was raised but the Court dismissed the appeal for want of a substantial federal question. Justices O'Connor, Scalia and Kennedy concurred in the dismissal but would have dismissed the issue for "want of a properly *presented* federal question." *Id.* 108 S. Ct. at 2008 (emphasis added). This disposition is consistent with the Court's observations in *Lavoie* and *Bankers Life*. Finally, in *Atlantic Richfield Company v. Nielsen*, 108 S. Ct. 2023 (1988) and *Ohio Casualty Insurance Company v. Downey Savings and Loan Association*, 108 S. Ct. 2023 (1988) the issue was raised but the Court denied certiorari. Justices O'Connor and Kennedy, however, would have granted certiorari.

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[1] The Court did not reach the Eighth Amendment issue in *Lavoie* because the state court's decision was vacated and remanded on other grounds. 475 U.S. at 828-829.

B. *The Court Should Resolve the Issue of Whether and How the Excessive Fines Clause of the Eighth Amendment Applies to Awards of Punitive Damages in Order to Reduce the Burden on State and Federal Courts and Eliminate Inconsistent Results.*

1. *State and Federal Courts have Inappropriately Extended the Court's Decision in* Ingraham *to Foreclose Eighth Amendment Challenges to Civil Penalties.*

The Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977), does not preclude constitutional challenge to punitive damages awards under the Excessive Fines Clause of the Eighth Amendment. In *Ingraham*, the Court considered the Cruel and Unusual Punishments Clause of the Eighth Amendment without reaching the scope of the Excessive Fines Clause of the Amendment. In *Ingraham*, public school pupils argued that paddling by school employees violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, entitling them to damages and to declaratory and injunctive relief under 42 U.S.C. §§ 1981-1988 (1986). 430 U.S. at 653-54. The Court's grant of certiorari was "limited to the questions of cruel and unusual punishment and procedural due process." *Id.* 430 U.S. at 659. Referring to "traditional common-law concepts," *Id.* 430 U.S. at 659, which the Court found approved reasonable corporal punishment, *Id.* 430 U.S. at 663, the Court concluded, over dissents by Justices White, Brennan, Marshall and Stevens, that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools." *Id.* 430 U.S. at 664.

The holding in *Ingraham*, that the Eighth Amendment Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," 430 U.S. at 664, has been inappropriately extended by some state and federal courts to reject evaluation of civil punitive damages under the Eighth Amendment Excessive Fines Clause.

Ingraham has led many federal and state courts to conclude flatly that the Eighth Amendment has no possible application to civil penalties and others to articulate conflicting standards for its application. *Ingraham* need not be overruled, but its scope should be clarified. As explained above, the Court has recognized the substantiality of the excessive fines issue and has implicitly concluded that *Ingraham* has left the issue unresolved.

2. ***State and Federal Courts Have Repeatedly and Inconsistently Addressed the Issue of Whether the Excessive Fines Clause of the Eighth Amendment Applies to Awards of Punitive Damages.***

The issue presented in this Petition has been presented to several state and federal courts with inconsistent results and at the cost of considerable judicial resources. The Court could reduce judicial burdens by resolving the issue of whether the Eighth Amendment applies to punitive damages awarded in civil actions. Until the Court resolves the issue, the level of litigation and confusion over this issue can be expected to increase. See *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988) (Excessive Fines Clause does not apply in the civil context); *Coty v. Ramsey Associates*, 546 A.2d 196 (Vt. 1988) (Eighth Amendment limited to criminal penalties); *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810 (Tex. Ct. App. 1988) (Eighth Amendment only applies to criminal penalties but as the Supreme Court has noted that some punishments are criminal in nature, court concludes that even if Eighth Amendment applies, punitive damages were not excessive); *Tetuan v. A. H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) (multiple punitive damages awards not violative of Eighth Amendment); *Palmer v. A. H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984) (Eighth Amendment cruel and unusual punishments prohibition applies only to criminal process, not to civil punitive damages; not explicitly addressing excessive fines argument although award was

challenged on excessive fines grounds). Other courts have manifested uncertainty or confusion about how to apply the Eighth Amendment to punitive damages. *See North Carolina Mutual Life Ins. Co. v. Holley*, Nos. 84-1211 and 84-1223, slip op. (Ala. Sep. 18, 1987) (Westlaw, 1987 WL 1625) (Maddox, J., concurring) (calling attention of trial court, on remand, to Eighth Amendment excessive fines argument); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295, 1306-1310 (Ala. 1986), appeal dismissed, 108 S. Ct. 2008 (1988) (Maddox, J. concurring) (unlike majority, would review Eighth Amendment excessive fines argument raised for first time on Petition for Rehearing after remand; historical review of Eighth Amendment Excessive Fines Clause supports conclusion that it covers punitive damages in civil cases, but damages not excessive under Eighth Amendment standards); *Jowers v. Nationwide Insurance Co.*, 832 F.2d 1246, 1252 n.8 (11th Cir. 1987) (invalidating punitive damages award but finding Eighth Amendment excessive fines argument "particularly unpersuasive"); *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988) (Even if Eighth Amendment applies to punitive damages, it does not apply to civil contempt penalties because sanctions are imposed to secure future compliance rather than to punish past behavior); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 n.8 (7th Cir. 1987), *petition for cert. filed*, No. 87-1262 (January 28, 1988) (treble RICO damages do not violate Eighth Amendment Excessive Fines Clause because they are largely compensatory in purpose); *Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), *petition for cert. filed*, No. 88-556 (September 30, 1988) (even if Eighth Amendment applies to civil damages, damages awarded not constitutionally excessive in this case).

II. The Excessive Fines Clause Of The Eighth Amendment Should Apply To Punitive Damages Awarded In Civil Actions.

The Court has assumed, without deciding, that "the Eighth Amendment applies to the state through the Due Process Clause of the Fourteenth Amendment." *McCleskey v. Kemp*, 481 U.S. 279, —— n.22, 107 S. Ct. 1756, 1770 n.2 (1987) (imposition of death penalty for murder and armed robbery did not offend Eighth Amendment despite study showing disparate rate of imposition on whites and blacks); *See also Robinson v. California*, 370 U.S. 660, 666 (1962) (state law making 'status' of narcotic addiction a criminal offense inflicted a 'cruel and unusual punishment,' in violation of the Fourteenth Amendment); *Spaziano v. Florida*, 468 U.S. 447, 468 n.1 (1984) (Stevens, J., concurring in part and dissenting in part) ("The Eighth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment.")

The Court has not had an appropriate case in which to decide the applicability of the Excessive Fines Clause of the Eighth Amendment to punitive damages, and has, therefore, not explicitly held that the Due Process Clause of the Fourteenth Amendment incorporates the Excessive Fines Clause as a limitation on punitive damages in a civil case. In several decisions, however, the Court has recognized that civil judicial proceedings and remedies involve "state action" for purposes of the Fourteenth Amendment, and, therefore, that certain aspects of civil proceedings commenced by private parties may be limited by the Fourteenth Amendment. In *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), the Court implicitly assumed that a damages judgment affirmed by a state supreme court satisfied the state action component of the Fourteenth Amendment. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519 (1987), at least four jutices (Brennan, Marshall, Blackmun, Stevens, JJ) concluded "that a creditor's invocation of a State's postjudg-

ment collection procedures constitutes action under color of state law within the meaning of 42 U.S.C. § 1983." *Id.* 481 U.S. at ——, 107 S. Ct. at 1530. *See also Id.* 107 S. Ct. at 1534 and 1536 n.1; and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 and 939 n.21 (1982) (invocation of pre-judgment attachment procedures constitutes state action). This case, like *Pennzoil*, *Claiborne Hardware* and *Lugar*, involves actual imposition of a $1.5 million punitive damages award. *See Agg v. Flanagan*, 855 F.2d 336, 343 (6th Cir. 1988) (deprivation of property for Fourteenth Amendment purposes was accomplished by judgment in child support cases, not by subsequent garnishment).

The purpose of punitive damages is to punish, therefore, their character puts the private plaintiff in the position normally occupied by the state—using the judicial process to deter socially undesirable conduct rather than using the judicial process to recover compensation for injury. Although "state action" may be attenuated when private parties commence civil proceedings to recover compensation, state action is implicated in a punitive damages case because the state acts in enforcing the judgment and because the state benefits through the deterrence which is the goal of punitive damages.

The Eighth Amendment has three components. The first clause prohibits excessive bail. The second clause prohibits excessive fines. The third clause prohibits cruel and unusual punishments. U.S. Const. Amend. VIII. This case involves the Excessive Fines Clause, which historically and conceptually applies to punitive damages.

The character of punitive damages brings them within the scope of the Excessive Fines Clause, in light of the purpose and historical origins of the clause. As the Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), punitive damages "are private fines levied by civil juries." Punitive damages are awarded

not to compensate for injury but, rather, to punish reprehensible conduct and to deter its future occurrence. *Bankers Life*, 108 S. Ct. at 1655 (O'Connor, concurring in the judgment, *quoting Gertz*, 418 U.S. at 350).

> Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.' For these reasons, the Court has forbidden the award of punitive damages in defamation suits brought against unions under the Railway Labor Act. For similar reasons, the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits."

Bankers Life, 108 S. Ct. at 1655 (O'Connor concurring in the judgment; citations omitted). In *Ingraham*, the court set out an historical analysis of the Cruel and Unusual Punishments Clause. The same analysis of the Excessive Fines Clause supports a conclusion that:

> [T]he excessive fines clause of the eighth amendment should apply to the imposition of punitive damages and all judicially imposed monetary sanctions in civil cases . . . . [T]his interpretation of the excessive fines clause is consistent with the historical development of the textual antecedents of the eighth amendment, the political theory that underlies the adoption of the eighth amendment, and the contemporary purposes served by punitive damages themselves. Moreover, this view in no way violates the holdings of those cases which have articulated the doctrine that the eighth amendment applies only to criminal sanctions.

Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1234 (1987).

Although the Excessive Fines Clause originated in the same documents as the Cruel and Unusual Punishments

Clause, its history and purpose is different, and, therefore, unlike the Cruel and Unusual Punishments Clause, the Excessive Fines Clause applies in civil actions. The origin of all three components of the Eighth Amendment, as the *Ingraham* court acknowledged, was article 10 of the 1689 English Declaration of Rights. The Eighth Amendment "text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689." *Ingraham*, 430 U.S. at 664. *See also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 158 (1986). Article 10 of the 1689 Bill of Rights said: "[t]hat excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." Massey at 1249-1250, *quoting*, Schwoerer, *The Declaration of Rights*, 1689, app. 1, at 297 (1981). The language is virtually identical to the language of the Eighth Amendment, except that the Eighth Amendment is written in mandatory terms, while article 10 is written in precatory terms.

The excessive fines clause of Article 10 of the 1689 Bill of Rights related to financial punishments that had been associated with almost every conceivable injury or offense under the *lex talionis* concept of Saxon law, succeeded by the *amercement* after the Norman conquest. Massey at 1251. Amercements were a form of penalty awarded by juries, the amount of which was discretionary and, therefore, subject to abuse. *Id.* An entire chapter of the Magna Carta was devoted to curbing amercements, *Id.* at 1252, and "[t]he reasonableness of fines in criminal cases [were] . . . usually regulated by the determination of the Magna Carta concerning amercements for misbehavior in matters of civil rights." 4 W. Blackstone, *Laws of England* 172 (1769). "Since ancient prohibitions against excessive amercements—the precursor to seventeenth century fines—applied to both civil and criminal proceedings, and since similar prohibitions

against excessive fines were ingrained in the case law, it was important for accuracy's sake that article ten not be limited to criminal cases." Massey at 1256. *See also* Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1717 (1987). *But see Ingraham*, 430 U.S. at 665 (interpreting development differently).[2]

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[2] One draft of the Declaration of Rights stated that: "The requiring excessive bail of persons committed in criminal cases, and imposing excessive fines and illegal punishments" should be prevented. Massey at 1254, *quoting*, Schwoerer, app. 3, at 300. Massey concluded that the elimination of the reference to criminal cases was intentional and that the Court's decision in *Ingraham* incorrectly interprets the historical development of the Excessive Fines Clause. Justice Powell, writing for the Court, concluded that deletion of the reference to criminal cases from the final draft of the Declaration of Rights was insignificant as the term remained in the preamble. The Court also concluded that the *Blackstone* commentary warranted treating the entire Eighth Amendment as applying to criminal cases. Massey states that:

> Justice Powell's views may be criticized on two grounds. First, the recitation in the Declaration's statement of grievances (or preamble) that excessive bail hath been required of persons committed in criminal cases, proves only that [King] James' judges were thought to violate ancient liberties particularly in criminal bail proceedings. The similar grievance concerning excessive fines is not similarly confined to criminal cases. Of more importance is the fact that the grievances were designed to specify the particular abuses of [King] James II; the declarations of rights were designed to reaffirm ancient liberties, whether or not [King] James had infringed them. It is thus a highly suspect conclusion that 'the deletion was without substantive significance.' Moreover, Justice Powell's reading of Blackstone is erroneous. In addressing excessive fines, Blackstone expressly relates the Declaration's guarantee to the Magna Carta's limitation upon excessive amercements. Although Blackstone applied the Declaration's excessive bail clause to criminal bail proceedings, he never asserted that the provision was confined strictly to criminal cases.

Massey at 1256 n.181 (citations omitted).

There are textual differences between the Eighth Amendment and other Constitutional Amendments which suggest that the Excessive Fines Clause is not limited to criminal cases. The Fifth and Sixth Amendments each specifically note that they apply to "criminal" offenses. The Eighth Amendment includes no such limitation. *Jeffries* at 149.

In his article entitled *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983), Professor Malcolm Wheeler concluded that punitive damages are sufficiently criminal in nature that they should be limited by the Fourth, Fifth and Sixth Amendments. Professor Wheeler further concluded that the *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process balancing formula requires reform of punitive damages procedures and standards. The Georgia Supreme Court has embraced this mode of excessive-fines analysis. In *Colonial Pipeline v. Brown*, 258 Ga. 115, 365 S.E.2d 827, *appeal dismissed*, 109 S. Ct. 36 (1988), the Georgia Supreme Court invalidated a $5 million punitive damages award as an excessive fine. The defendant had challenged the punitive damages award under the Eighth Amendment Excessive Fines Clause. *Id.* 365 S.E.2d at 829. Although the Georgia Supreme Court rested its conclusion primarily on the state constitution, *Id.* 365 S.E.2d at 829 n.2, its extensive analysis relates to the Eighth Amendment of the United States Constitution, the model for the state provision. *See also Id.* 365 S.E.2d at 834 (Clarke, P.J. dissenting, characterizing plurality opinion as predicated as much on the Excessive Fines Clause of the Eighth Amendment to the United States Constitution as on the Georgia Constitution).

The Georgia Supreme Court engaged in comprehensive historical review of the purposes and scope of the Eighth Amendment's Excessive Fines Clause, concluding that it has an origin not limited to criminal cases. *Colonial*

Pipeline, 365 S.E.2d at 830. The Court concluded that imposition of excessive punitive damages in a tort case where no culpability beyond negligence is shown violates the two touchstones of the Excessive Fines Clause: (1) a requirement of reasonableness, of proportionality, of sensible relation between punishment and offense, and (2) a requirement that the penalty not destroy the offender's means of pursuing his particular trade or calling. *Id.* 365 S.E.2d at 831. It noted that the case involved only passive negligence, there was no bodily injury and that the punitive damages award was 100 times the compensatory property damage award. *Id.* 365 S.E.2d at 833.

III. This Litigation Presents, In Sharp Relief, a Case in Which An Excessive Punitive Damages Award Violates The Eighth Amendment Excessive Fines Clause.

There is a strong judicial consensus about the factors that should be taken into account in determining whether a fine is excessive. A Court should consider: (1) the objectives of the fines; (2) the importance and magnitude of the public interest sought to be protected; (3) the circumstances and nature of the act for which it is imposed; and (4) in some instances, the ability of the accused to pay. *State v. Trailer Service, Inc.*, 61 Wis. 2d 400, 212 N.W.2d 683, 689 (1973) (applying state constitution excessive fines clause). *See also Wheatt v. State*, 410 So.2d 479, 481-482 (Ala. Crim. App. 1982) (citing *Trailer* and evaluating the importance of the public interest sought to be protected.); *Gooch v. Rogers*, 193 Or. 158, 238 P.2d 274, 286 (1951) (applying federal and state constitutions' excessive fines clauses and noting that the court may consider the nature of the offense in evaluating the excessiveness of a fine); and *Lapinski v. Copacino*, 131 Conn. 119, 38 A.2d 592 (1944) (applying Eighth Amendment Excessive Fines Clause and noting that the amount of fine which may be imposed depends upon the objects to be accomplished).

The application of these standards establishes a context for considering whether the fine is proportional to the offense or is overly burdensome. Proportionality has been analyzed from a number of perspectives. *See Colonial Pipelines*, 365 S.E.2d at 831; *Sizemore v. Commonwealth*, 485 S.W.2d 498 (Ky. 1972) (in evaluating a fine challenged on Eighth Amendment and state constitutional grounds, the punishment is gauged by the enormity of the offense); *Williams v. State*, 420 So.2d 91 (Ala. Cr. App. 1982) (holding that a fine imposed for trafficking in drugs was constitutional because commensurate with the amount of money involved in the drug traffic and the price placed on controlled substances); *Gooch*, 238 P.2d at 286 (to be void, a penalty must be grossly oppressive or disproportionate to the offense); *Lapinski*, 38 A.2d at 598 (concluding that statute was constitutional because the authorized penalty was not disproportionate to the offense); *Walsh v. Gurman*, 132 Conn. 58, 42 A.2d 362, 365, *cert. denied sub nom, Gurman v. Illg*, 326 U.S. 719 (1945) (award is not so disproportionate to the offense committed as to be violative of the provisions of either the federal or state constitutions prohibiting excessive fines.)

The test of burdensomeness requires that a court take into account the wealth of the fined individual. *People v. Ingham*, 115 Misc. 2d 64, 453 N.Y.S.2d 325, 328 (N.Y. Crim. Ct. 1982). Excessiveness is gauged in relation to the fine's effect on the fined subject and may be excessive even if the subject is wealthy, if it exacts too significant a share of the subject's wealth. *Ingham*, 453 N.Y.S.2d at 328. *See also Colonial Pipeline*, 365 S.E.2d at 831 (penalty inflicted should not destroy defendant's means of making a living); *People v. Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972, 973 (1966) (fine assessed on individual with no funds is necessarily excessive because any fine which exceeds the amount which is reasonable, just, proper or usual is excessive).

Consideration of these standards leads inevitably to the conclusion that the $1.5 million punitive damages award in this case is unconstitutionally excessive. Punitive damages were awarded in this case "for the sake of example and by way of punishment" (Plaintiff's Proposed Jury Instruction No. 35). Specifically, the Supreme Court of Hawaii stated that "'[Punitive Damages] act as a means of punishment to the wrongdoer and as an example and deterrent to others.'" *quoting*, *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978). The punitive damage award is intended to deter employers from terminating persons in violation of a clear public policy. In this case the court identified the offended public policy as "a retaliatory discharge in apparent furtherance of antitrust violations." *Parnar I*, 652 P.2d at 631.

Petitioners contend that common law punitive damages to vindicate this public policy are unnecessary and duplicative. The importance of the state's public policy of deterring terminations in furtherance of antitrust violations must be evaluated in perspective with Section 4 of the Clayton Act which has been construed to provide a remedy to employees discharged for refusing to participate in anticompetitive activities. *Parnar I*, 652 F.2d at 631, *citing*, *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D.Pa. 1979). Thus, the antitrust laws preexist *Parnar I* as a deterrent to a retaliatory discharge like the one alleged in this action. Punitive damages are not needed to prevent terminations allegedly in furtherance of antitrust violations. The punitive damages awarded have the same objective as preexisting federal legislation and are not critical to the furtherance of the public policy that underlies this lawsuit.

The particular circumstances of the Petitioners and the circumstances that gave rise to the claim also establish that the award was disproportionate and overly burdensome. At the time the Respondent was terminated, the

state courts of Hawaii did not recognize a cause of action for wrongful termination. Petitioners, therefore, had no reason to believe their actions could be found tortious. Neither did they have any reason to believe that they might be subject to a punitive damages award. Under the Hawaii Supreme Court's rationale for awarding punitive damages, the defendants were neither an apt example to others nor deserving of significant financial punishment. They were caught up in a change in the common law. Allowing the jury to award punitive damages as part of a newly created cause of action violated fundamental notions of process and fairness.

Analogously, the Federal Constitution prohibits ex post facto laws "which render an act punishable in a manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Although the Ex Post Facto Clause restricts only legislation, the purpose of the Clause is to ensure that persons have "fair warning" of what conduct will give rise to criminal penalties. Therefore, this constitutional value is protected against judicial action by the Due Process Clause of the Fifth Amendment to the Constitution. *Marks v. United States*, 430 U.S. 188, 191-192 (1977). *See also Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (judicial enlargement of criminal statute applied retroactively violates Due Process); *Casillas v. Scully*, 769 F.2d 60, 65 (2d Cir. 1985) and *United States v. Goodheim*, 651 F.2d 1294 (9th Cir. 1981).

Punitive damages serve the same interests as criminal penalties and, therefore, should not be imposed on individuals who have had no warning that their conduct may subject them to such penalties. *See Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (creating cause of action for retaliatory discharge but refusing to award punitive damages because to do so would permit jury to punish defendants for conduct they could not have known

was actionable). *See also Hansen v. Harrah's* 100 Nev. 60, 675 P.2d 394, 397 (1984) (refusing to award punitive damages on newly created cause of action because it would be unfair to punish for conduct employers could not have known was actionable); *Murphy v. City of Topeka v. Shawnee County Dept. of Labor Services*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) (refusing to award punitive damages on newly created cause of action); *Brown v. Transcon Lines* 284 Or. 597, 588 P.2d 1087 (1978) (refusing to award punitive damages on newly created retaliatory discharge action) and *Kelsay v. Motorola, Inc.* 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (refusing to award punitive damages on newly created retaliatory discharge action).

Petitioners had no warning that their decision to terminate Respondent would be tortious and perforce no warning that their actions would be punished by a punitive damage award. The $1.5 million award imposed was unconstitutionally excessive in circumstances where it punishes a defendant who had no fair warning that its conduct was either tortious or actionable under state law.

The final factor the court should consider is the ability to pay. Although the Petitioners can pay the punitive damages award of $1.5 million, it represents 15% of the Petitioners' stipulated net worth. This amount both in absolute and relative terms is excessive. *Ingham*, 453 N.Y.S.2d at 328. The significance of the punishment inflicted in relation to the Petitioners' net worth points up the irrational character of the punitive damage award. It cannot find a justification in either its purpose or its impact.

With these considerations in mind, it is clear that the award of punitive damages was excessive. First, the award is disproportionate to the alleged offense. In this case, the Petitioner simply discharged an unsatisfactory employee. Assuming that Respondent was discharged in

order to prevent her from participating in an antitrust investigation, which assumption makes no logical sense, the punitive damage award was excessive. The jury awarded only $300,000 in compensatory damages. The punitive damages award of $1.5 million is five times the actual damages awarded. More importantly, the fine far exceeds punitive damages awarded in more egregious cases. The $1.5 million punitive damages award is 150 times greater than the punitive damages awarded in a Hawaii case involving assault and battery resulting in serious trauma to the Plaintiff. *See Caris v. Ludloff*, No. 76788, slip op. (1st Cir. Aug. 29, 1985) (Lodged with the Court commencing at 1b) The $1.5 million punitive damages award is 75 times greater than the punitive damages awarded in cases involving assault, rape and sodomy in Hawaii. *See Ofisa v. Navarette*, No. 78155, slip op. (1st Cir. Haw. Aug. 6, 1985) (Lodged with the Court commencing at 2b). The case most similar to this case is a recent Hawaiian case involving an attorney discharged and allegedly defamed by his employer. The $1.5 million punitive damages award in this case is 150% greater than those awarded to the discharged attorney. *See Locriccio v. Legal Services Corporation, et al.*, No. 80-0413 slip op. (D. Haw. Dec. 17, 1985) (Lodged with the Court commencing at 3b). *See also Kapiolani Commercial Center v. A & S Partnership*, 723 P.2d 181 (Haw. 1986) (Jury awarded $500,000 in punitive damages but court reversed judgment on other grounds); *Kang*, 587 P.2d at 293 (holding defendant guilty of "culpable wanton and malicious fraud" but reducing as excessive $20,000 punitive damages award); *Rossell v. Honolulu*, 59 Haw. 173, 579 P.2d 663 (1978) (upholding $15,000 punitive damages award for assault and battery); and *Lyon v. Bush*, 49 Haw. 116, 412 P.2d 662 (1966) (affirming $10,000 punitive damages award). When compared to these cases, the punitive damages awarded to Respondent were clearly not proportional to the offense.

An award of 15% of a party's net worth is clearly overly burdensome. The punitive damages award of $1.5 million constitutes too significant a levy on the Petitioner's assets and is, therefore, unconstitutionally excessive.

IV. The Petitioners Properly Raised The Issue Of Whether The Excessive Award Of Punitive Damages Violated The Eighth Amendment Before The Supreme Court Of Hawaii.

The Court has held that when a constitutional issue is not passed on by the highest court of the state in which a case arose, it will presume that the issue was not properly presented. *Webb v. Webb*, 451 U.S. 493, 495 (1981). The presumption is, however, rebuttable and the petitioner bears the burden of showing that the issue was presented to the state court. *Id.* 451 U.S. at 495. The Court's jurisdiction does not depend on whether the lower court addressed the question but depends instead on whether the federal question was raised. *Bloeth v. State of New York*, 82 S. Ct. 661 (1962). A question is adequately preserved for review by the Court if the record as a whole shows that either expressly or by clear implication the issue was raised below. *Street v. New York*, 394 U.S. 576 (1969). *See also Webb*, 451 U.S. at 496. "There should be no doubt from the record that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature and substance of the Federal claim at the time and in the manner required by state law." *Bankers Life*, 108 S. Ct. at 1650, *quoting*, *Webb*, 451 U.S. at 501.

The Decision of the Supreme Court of Hawaii makes no mention of the constitutional issue raised by Petitioners. However, Judge Nakamura, in dissent, notes first that the court found only five of twelve issues raised by the Petitioners worthy of discussion. Thereafter, Judge Nakamura dissents from the majority opinion on the ground, *inter alia*, that the punitive damages awarded

by the jury were excessive and violated the Petitioners' constitutional rights. Thus, it is clear that the court had before it the issue of whether an excessive award of punitive damages violates the Federal Constitution.

It is clear from the record, as well as from Judge Nakamura's dissent, that the Petitioner raised the issue of whether the award of punitive damages violated the Excessive Fines Clause of the Eighth Amendment and, therefore, the Petitioners have met their burden of showing that the issue was properly presented to the state court for its consideration. As described above, the issue was raised in the Petitioners' Opening Brief On Appeal to the Supreme Court of Hawaii and argued before the Supreme Court of Hawaii.[3] The Petitioners cited both the State Constitution and the Federal Constitution and specifically identified the Eighth Amendment as the source of their claim.[4] Thus, the issue was presented to

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[3] In *Mobile Dodge*, the issue of whether a punitive damages award was constitutionally excessive was raised for the first time in a Motion for Rehearing to the Alabama Supreme Court. Similarly, in *Atlantic Richfield* the Petitioner conceded that it had "not specifically assert[ed] an Eighth Amendment . . . right to be free of excessive civil punitive damages" before the state court. Therefore, the record in this case is distinguishable from the records in *Mobile Dodge* and in *Atlantic Richfield*. *Cf. Downey Savings*.

[4] The issue of whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damages awards was raised and argued before this Court in *Bankers Life*. The court declined to decide the issue because the claim was not properly raised "in state court. . . ." 108 S.Ct. at 1650. In *Bankers Life*, the petitioner had argued, in its Petition for Rehearing, that the "punitive damage award was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." *Id.* The Court concluded that "[a] party may not preserve a constitutional challenge by generally invoking the constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.* The Court noted that the petitioner did not identify the Eighth Amendment, the Federal Constitution or federal law as the source of its claim before the state court. *Id.* at 1600. This case is clearly distinguishable from

the State Supreme Court and its silence on the constitutional issue is necessarily a denial of Petitioners' constitutional arguments.

CONCLUSION

The Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

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Bankers Life as the Petitioners did specifically identify the Eighth Amendment of the Federal Constitution as the source of their claims in their Opening Brief on Appeal before the Supreme Court of Hawaii.

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF HAWAII

No. 12387

Civ. No. 52878

EUGENIE PARNAR,
Plaintiff-Appellee/
Cross-Appellant,

vs.

AMERICANA HOTELS, INC., a Delaware corporation,
FLAGSHIP INTERNATIONAL, INC., a Delaware corporation,
and MARK E. LIQUORI,
Defendants-Appellants/
Cross-Appellees,

and

JOHN DOES 1 THRU 25, JANE DOES 1 THRU 25,
DOE CORPORATIONS 1 THRU 25,
DOE PARTNERSHIPS 1 THRU 25,
Defendants.

APPEAL FROM THE:

1) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 10, 1987;

2) SPECIAL VERDICT, FILED APRIL 24, 1987;

3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR DIRECTED VERDICT, FILED MAY 6, 1987;

4) JUDGMENT, FILED MAY 26, 1987;

5) ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FILED AUGUST 13, 1987; and

6) ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL, FILED AUGUST 13, 1987

FIRST CIRCUIT COURT

CROSS-APPEAL FROM THE:

1) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR DIRECTED VERDICT, FILED MAY 6, 1987;

2) JUDGMENT, FILED MAY 26, 1987;

3) JUDGMENT, FILED JULY 14, 1987;

4) ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FILED AUGUST 13, 1987; and

5) ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL, FILED AUGUST 13, 1987

FIRST CIRCUIT COURT

HONORABLE HIROSHI OSHIRO
HONORABLE ARTHUR S. K. FONG
HONORABLE TOSHIMI SODETANI
HONORABLE PHILIP T. CHUN
HONORABLE FRANK T. TAKAO
HONORABLE ROBERT G. KLEIN
HONORABLE MARCIA WALDORF
HONORABLE RONALD T. Y. MOON
Judges

MEMORANDUM OPINION

The essential facts of this case are adequately recounted in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982) (*Parnar I*). In *Parnar I*, this court recognized that an at-will employee may bring an action for wrongful discharge against his or her employer when the discharge violates a clear mandate of public policy. This court held that a discharge of an employee by his or her employer to prevent him or her from testifying in an antitrust action aimed at the employer violates public policy. This Court held in Parnar I that there were genuine issues of material facts pertaining to the reasons for Parnar's discharge, and therefore, the summary judgment was vacated and the case remanded for trial.

Upon remand, Eugenie Parnar amended her complaint by adding a claim for breach of employment contract. A jury found Americana Hotels, Inc., Flagship International, Inc., and Mark E. Liquori (defendants) guilty of both wrongful discharge and breach of contract. Parnar was awarded $275,000 for emotional distress, $300,000 in lost wages, and $1.5 million in punitive damages.

Defendants contend that the trial court committed numerous errors and urges reversal or remittitur by this court. We affirm.

1.

Defendants contend that the trial court erred when it refused to grant defendants' motion for directed verdict on Parnar's claim for wrongful discharge.

> [A] directed verdict may be granted only when after disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiff's

> favor, it can be said that there is no evidence to support a jury verdict in [plaintiff's] favor.

Wakabayashi v. Hertz, 66 Haw. 265, 271, 660 P.2d 1309, 1313 (1983) (citations and internal quotation marks omitted).

There was evidence at trial that Parnar was discharged while defendants were being investigated for possible antitrust violations; and that upon being discharged, defendant Liquori suggested that Parnar move back to the mainland. Also, Tookie Evans testified that he heard management personnel, during the investigation, describe Parnar as a "liability" to the hotel. Inferences which could be drawn from this evidence would clearly support a jury verdict in Parnar's favor. We hold that the trial court did not err in denying defendants' motion for directed verdict.

2.

Defendants contend that the trial court erred when it failed to grant summary judgment or directed verdict in defendants' favor on the claim for breach of contract.

Any error which may have been committed in regard to the claim for breach of contract was harmless because Parnar was not awarded any damages pursuant to a breach of contract. Parnar was awarded damages for lost wages and emotional distress, and also punitive damages as the result of defendants' wrongful discharge. Even if this court were to hold that summary judgment or directed verdict should have been granted in defendants' favor, nonetheless, defendants' liability for a wrongful discharge of Parnar would not be extinguished, and the award of damages would stand.

3.

The trial court, over defendants' objection, permitted Jerrold Guben, an attorney, to testify as an expert in

antitrust law. Defendants contend that this constitutes reversible error.

> Admission of opinion evidence is a matter largely within the discretion of the trial court, and only an abuse of that discretion can result in possible reversal.

Sherry v. Asing, 56 Haw. 135, 148, 531 P.2d 648, 658 (1975) (citations omitted).

> To constitute an abuse of discretion, it must be clearly established that the trial court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Gakiya v. Hallmark Properties, Inc., 68 Haw. 564, 568-69, 722 P.2d 460, 463 (1986) (citations and internal quotation marks omitted).

Defendants argue that the judge alone is permitted to instruct the jury on the law. Guben's testimony, however, did not go to the law which the jury must apply in deciding the case. The trial court determined that Guben's testimony would help the trier of facts decide "what was in Mr. Liquori's mind when he fired Genie Parnar[.]" Transcript of April 21, 1987 at 173.

Whether defendants were concerned about the antitrust investigation and Parnar's role in the investigation are relevant to Parnar's claim for wrongful discharge. To assist the jury in determining Parnar's claim, the trial court decided to allow Guben, as a qualified expert, to give his opinion as to whether certain activities carried on by the defendants constituted a violation of the antitrust laws. We cannot conclude that the trial court's decision to allow Guben to testify exceeded the bounds of reason or disregarded rules or principles of law or practice. We hold that the trial court did not abuse its discretion.

4.

The defendants contend that the trial court erred in refusing to give defendants' proposed jury instructions EEE and NNN.

Both were instructions on the law as to what does or does not constitute an antitrust violation. "It is not error for the trial judge to refuse to give an instruction about an issue which is not in controversy." *Mahoney v. Mitchell*, 4 Haw. App. 410, 419, 668 P.2d 35, 41 (1983). Since this case did not turn on whether or not defendants violated the antitrust laws, the refusal of the trial court to give these instructions to the jury was not error.

5.

Defendants argue that the amounts awarded to plaintiff are unsupported by the evidence and are excessive.

> In reviewing a jury's award of damages when a claim of excessiveness is pressed upon us for decision, we are bound by the general rule that a finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.

Quedding v. Arisumi Brothers, Inc., 66 Haw. 335, 339, 661 P.2d 706, 709 (1983) (per curiam) (citations and internal quotation marks omitted).

At trial, Parnar testified extensively about her emotional turmoil following her discharge and her attempt at finding subsequent employment.

Upon review of the record, we cannot say that the amount of damages awarded was palpably not supported

by the evidence, or was so outrageous and excessive as to cause this court to substitute its own judgment for that of the jury.

We also decline to reverse or reduce the award of punitive damages. "[Punitive damages] act as a means of punishment to the wrongdoer and as an example and deterrent to others." *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978). The jury found that defendants had discharged Parnar in violation of a clear mandate of public policy, therefore punishment in the form of punitive damages was allowable. Further, evidence regarding defendants' worth supports the amount of punitive damages awarded.

6.

Defendants' other contentions are without merit. Similarly, Parnar's contentions in her cross-appeal are without merit.

Affirmed.

DATED: Honolulu, Hawaii, August 17, 1988.

Richard J. Kowen
(Burnham H. Greeley and James H. Hershey with him on the briefs; Greeley, Walker & Kowan) for Defendants-Appellants/Cross-Appellees Americana Hotels, Inc., Flagship International, Inc. and Mark E. Liquori.

/s/ Herman Lum

/s/ Frank D. Padgett

/s/ Yoshimi Hayashi

/s/ James Waketsuki

Michael A. Lilly of Green, Ning, Lilly & Jones for Plaintiff-Appellee/Cross-Appellant Eugene Parnar.

DISSENTING OPINION OF NAKAMURA, J.

Finding five of the twelve issues raised by the defendants-appellants worthy of discussion, the court concludes no error was committed by the trial court and affirms a judgment for damages amounting to $2,075,000. Inasmuch as important questions relating to torts, contracts, and trial practice were raised, I would not have disposed of the appeal by way of a memorandum opinion. And since I reach conclusions at odds with those reached by the court on the five questions it chooses to discuss, I dissent.

I.

The court initially concludes "the trial court did not err in denying defendants' motion for directed verdict on Parnar's claim for wrongful discharge." It reasons there was evidence supporting the claim since "Parnar was discharged while defendants were being investigated for possible antitrust violations[,]" defendant Liquori thereafter "suggested that Parnar move back to the mainland[,]" and "Tookie Evans testified that he heard management personnel, during the investigation, describe Parnar as a 'liability' to the hotel."

True, as the court states,

> [a] directed verdict may be granted only when after disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor, it can be said that there is no evidence to support a jury verdict in his favor.

Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 77, 470 P.2d 240, 244 (1970) (citations omitted) (quoted in *Wakabayashi v. Hertz Corp.*, 66 Haw. 265, 271, 660 P.2d 1309, 1313 (1983)). The claim, however, was that the plaintiff "was discharged in retaliation for her unwillingness to suppress testimony which was relevant to

the criminal indictment pending against the Hotel, and for her unwillingness to participate in a conspiracy to fix prices." There is, of course, no direct evidence in the record to support the claims; the court relies on inferences drawn from questionable facts and ambiguous statements to sustain the claim of wrongful discharge. But I find no evidence from which a legitimate inference may be drawn that the plaintiff was discharged for the reasons above or in violation of a clear mandate of public policy.

The rule is not that *any* evidence tending to support the plaintiff's case will defeat a motion for directed verdict, for more than a scintilla of evidence is required to send a case to the jury. *See* 9 Wright and Miller, *Federal Practice and Procedure: Civil* § 2524 (1971). Moreover, the evidence must be such that a "legitimate" inference in plaintiff's favor may be drawn from it. *Stewart v. Budget Rent-A-Car Corp., supra.* As we said in *Young v. Price*, 48 Haw. 22, 495 P.2d 365 (1964), the evidence and the inferences must be "of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue[.]" *Id.* at 24, 395 P.2d at 367 (quoting *Young v. Price*, 47 Haw. 309, 313, 388 P.2d 203, 206 (1963)). Or as we said in another context, evidence which will support a jury verdict is "substantial evidence." *Adair v. Hustace*, 64 Haw. 314, 325, 640 P.2d 294, 302 (1982); *Ashford v. Thomas Cook & Son*, 52 Haw. 113, 123, 471 P.2d 530, 536 (1970).

The gravamen of plaintiff's case on her tort claim was that she was discharged to prevent her from giving damaging evidence about the defendants' illegal activities. In support of the conclusion "that the trial court did not err in denying defendants' motion for directed verdict," this court can only point to the fact that plaintiff "was discharged while defendants were being investigated for possible antitrust violations," that "defendant

Liquori suggested that Parnar move back to the mainland" at the time he discharged her, and "Tookie Evans testified that he heard management personnel during the investigation, describe Parnar as a 'liability' to the hotel."

That the plaintiff was discharged "while defendants were being investigated" hardly gives rise to a legitimate inference that the termination was motivated by a desire to suppress evidence. The converse would be more logical —an employee who has been terminated would have absolutely no reason to withhold evidence. A suggestion to move back to the mainland, likewise, does not create a reasonable inference that the defendants meant thereby to prevent the plaintiff from giving evidence of their activities—residence on the mainland would be most unlikely to preclude testimony sought by the Department of Justice in the prosecution of antitrust violations.

Insofar as the testimony of Tookie Evans is concerned, I have combed the record in vain for evidence "that he heard management personnel . . . describe Parnar as a 'liability' to the hotel." Evans' testimony in this regard appears at page 250 of Volume II of the transcript of proceedings on June 21, 1987. And his only reference to Parnar's being a "liability" appears in the following excerpt therefrom:

> Q What was your impression as a result of that meeting?
>
> A My impression was that we had probably created a liability for ourselves, in effect, that someone was continuing to do something which would possibly in the long run provide information for the investigation that was going on.
>
> Q And that was who?
>
> A That would be Genie Parnar.

The court's opinion mistakenly attributes the "liability" statement to persons other than Evans.

Thus, there is no substantial evidence from which a "legitimate" or "reasonable" inference could be drawn that the discharge was motivated by a desire to suppress evidence of the defendants' illegal activities. A directed verdict in favor of the defendants definitely was in order as far as the tort claim was concerned.

II.

With respect to the plaintiff's claim for breach of contract, the court brushes the defendants' thesis aside with a statement that "[a]ny error which may have been committed in regard to the claim . . . was harmless because Parnar was not awarded any damages to the breach of contract." The issue, in my opinion, is more than worthy of plenary consideration. For the record does not substantiate the court's bald assumption that the jury's finding on "the total value of Plaintiff's damages for past and future income" did not constitute damages for breach of contract. If the $300,000 for loss of "past and future income" represented tort damages as the court assumes, there was no provision in the special verdict form for the jury to indicate what damages it thought had been suffered as a consequence of the purported breach of an implied contract of employment.

I hardly think this was the case, for the jury was directed to render findings on whether there was "an implied contract of employment" and whether "the Defendants breach[ed] any terms and conditions [thereof] when the Plaintiff was discharged on October 24, 1975." Since these queries were followed by interrogatories on whether the Plaintiff sustained "any compensatory damages for lost income" and on "the total present value of Plaintiff's damages for past and future income," I conclude the $300,000 can only represent damages for breach of contract. Otherwise, I would have to believe the trial court

purposely omitted the most crucial interrogatory after taking the trouble to seek specific findings related to an implied contract of employment.

If the court had not treated the breach of contract issue so lightly, it could only have concluded the trial court erred by not directing a verdict. The employer in this case made no "promises of *specific treatment in specific situations*" to employees who otherwise could be deemed at-will employees. *Kinoshita v. Canadian Pacific Airlines, Inc.*, 68 Haw. ——, ——, 724 P.2d 110, 116 (1986) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 228, 685 P.2d 1081, 1087 (1984) (emphasis in original)). *Kinoshita* was a narrowly drawn exception to the at-will doctrine; it did not wipe out all principles of contract law and render employer policy statements generally enforceable. Inasmuch as there was no evidence of promises of specific treatment in specific situations, a verdict in favor of the defendants should have been directed on the contract claim.

III.

The third issue the court chooses to discuss is whether the trial court should have allowed the jury to hear testimony by an expert on antitrust law, testimony which culminated in the following colloquy between plaintiff's counsel and the witness which appears at pages 206-07 of Volume II of the Transcript of Proceedings conducted on April 21, 1987:

> Q Of course this interrogatory the plaintiff sent over to defendants and this is what they sent back.
>
> Jerry, taking everything you have said into consideration and your background and skill and knowledge and experience, do you have an opinion based on all of that as to whether what Genie was doing was a violation of antitrust in 1975?
>
> A In 1975?

Q Well, 1972 to 1975.

A Yes. I'd have to answer yes.

Q And what's your opinion?

A That it would be a violation of the antitrust laws. And if one of my clients asked me even today if they could engage in that type of information, I'd have to say no. It appears to be, again, virtually notwithstanding the Supreme Court, virtually a per se violation. And I'd be very concerned if any of my clients engaged in that type of conduct.

MR. LILLY: Thank you Jerry.

Finding the trial court felt Guben's testimony would help the trier of fact decide "what was in Mr. Liquori's mind when he fired Genie Parnar," the court concludes "there was no abuse of discretion" when "the trial court decided to allow Jerrold Guben, as a qualified expert, to give his opinion as to whether certain activities carried on by the defendants constituted a violation of the antitrust laws."

Whether or not the testimony should have been admitted, in my view, was hardly a matter of discretion. In section 4 of the opinion, the court flatly states "what does or does not constitute an antitrust violation[]" was "not in controversy[]" and "this case did not turn on whether or not defendants violated the antitrust laws[.]" I could not agree more wholeheartedly. But it follows, then, that Mr. Guben's lengthy testimony covering sixty three pages of the transcript was irrelevant and immaterial. Irrelevant testimony, of course, is inadmissible, and a trial court has no discretion to admit it, particularly when it can only be prejudicial to the party opposing it. *See* Hawaii Rules of Evidence (Haw. R. Evid.) Rules 401, 402, and 403.

When Mr. Guben was called as a witness, defendants' counsel objected, stating in part:

> Next, your Honor, if Mr. Guben opines as to the conduct as constituting a per se violation what that is going to result in by necessity is that Mr. Hersey [sic] will in effect get into, I'll call it a discussion, with Mr. Guben.
>
> In fact, it will be an argument of Mr. Guben over case law interpretation of case law footnotes over case law; what that means, how it impacted on Mr. Guben's opinion. And we're going to have a debate going on in front of the jury as to what the antitrust law is.

Tr. of April 21, 1987, Vol. II, pp. 169-70.

What counsel feared, came to pass. Though the trial court admitted the testimony on the ground that it would "help[ ] to explain the state of Mr. Liquori's mind when he took whatever action he did in this with Miss Parnar[,]" Mr. Guben did anything but this. He delivered a rambling discourse on antitrust law, ending with per se violations. Even if the testimony were relevant somehow, "its probative value [was] substantially outweighed by the danger of unfair prejudice[.]" Haw. R. Evid. Rule 403. Thus, I would still have to say there was an abuse of discretion amounting to error.

Counsel emphasized too that under Haw. R. Evid. Rule 702, expert testimony was admissible if it assisted the trier of fact to understand the evidence to determine a fact in issue, not the law. Wigmore explains why testimonial opinion on the law is excluded:

> The exclusion of testimonial opinion rests here on a ground slightly different from that of all the other instances. The general principle (§ 1918 *supra*) is exemplified, to be sure, that the tribunal does not need the witness' judgment and hence will insist on dispensing with it. But here it is not that the *jury* can of themselves determine equally well; it is that the *judge* (or the jury as instructed by the judge)

> can determine equally well. The principle is the same; but the peculiarity is that a different member of the tribunal is relied upon as equipped with the data. It is not the common knowledge of the jury which renders the witness' opinion unnecessary, but the special legal knowledge of the judge.

7 J. Wigmore, *Evidence* § 1952 (Chadbourn rev. ed.) (1978) (emphasis in original, footnote omitted).

Since there was no basis in fact or in law for the admission of Mr. Guben's testimony, I conclude its admission was error.

IV.

On the related issue of whether defendants' proposed jury instructions EEE and NNN dealing with "what does or does not constitute an antitrust violation" the court concludes "[i]t [was] not error for the trial judge to refuse to give an instruction about an issue which [was] not in controversy." Granted, no error can be predicated on the rejection of instructions on matters not in issue. The jury, nonetheless, was advised on what constituted a violation of the antitrust laws. The record reveals the following instruction was read and later transmitted to the jury in writing:

> The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or in industry; all to the end that the consuming public may receive better goods and services at a lower cost.
>
> So any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing system of the open market in interstate trade and commerce, constitutes

an unreasonable restraint of interstate trade, and is a violation of the antitrust laws.

Inasmuch as Mr. Guben had characterized the defendants' actions as virtual per se violations of the antitrust laws, the instruction could only have cast the defendants in a most unfavorable light. It was plain error for the trial court to give such an instruction on a matter not in issue, particularly when efforts to ameliorate the probable prejudicial effect of the instruction were rebuffed. Since the instruction was cast in the broadest possible language, employing terms like "*any* unreasonable interference . . . with the ordinary, usual and freely-competitive pricing system of the open market," the rejection of the instructions proffered by the defendants compounded the error.

V.

Finally, the court affirms the award of compensatory damages in the sum of $575,000 and punitive damages in the sum of $1,500,000. The compensatory damages, in my opinion, were clearly excessive. The real vice of the judgment, however, was the allowance of punitive damages in a seven-figure amount.

The plaintiff was afforded an opportunity to litigate her tort claim against the defendants because this court decided in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982), to modify the at-will doctrine which was the prevailing rule where the termination of the employer-employee relationship was concerned. We recognized the harshness of the doctrine, and "[b]ecause the courts are a proper forum for modification of the judicially created at-will doctrine [we deemed] it appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases." *Id.* at 379, 652 P.2d at 631. Thus, we held "an employer may be held liable in tort where his discharge of an employee violates a

clear mandate of public policy." *Id.* at 380, 652 P.2d at 631 (footnote omitted). And the summary judgment against Miss Parnar on the tort count of her complaint was vacated and the case was remanded for trial. The trial of the newly established tort resulted in an extraordinary punitive damage judgment, and the defendants urge its reversal. Elementary principles of due process impel me to agree.

Our concern here is with "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). In this "one anomalous respect . . . the ideas underlying the criminal law have invaded the field of torts." W.P. Keeton, *Prosser and Keeton on the Law of Torts* § 2 (5th ed. 1984). Punitive damages are more fully described as follows in a law review note:

> They are a criminal/civil hybrid: while arising only in civil cases, they mainly serve the criminal law goals of retribution and deterrence rather than the traditional compensatory goals of the civil law. Like criminal punishments, punitive damages are assessed with respect to the defendant's culpability and the egregiousness of his conduct. Punitive damages serve as a surrogate for criminal sanctions by punishing misbehavior through the civil law that may go unpunished or underpunished in the criminal law. As such, the law of punitive damages historically has not been concerned with awarding a windfall to the successful plaintiff but rather has looked to punishing the culpable defendant. Ultimately, it is the state and not the individual that is exacting the punishment.

Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1703 (1987) (footnotes omitted).

Punishment under the criminal law, of course, "cannot constitutionally be imposed when the criminality of the

conduct is not capable of being known beforehand." *Nees v. Hocks*, 272 Or. 210, 221, 536 P.2d 512, 517 (1975). That the punishment here is being imposed under the civil law, however, does not render it any fairer than punishment under an *ex post facto* criminal law.

When Miss Parnar was discharged, the common law of the State imposed no liability upon the defendants for terminating her employment. The circuit court, therefore, correctly ruled she had no claim for damages in tort or contract. We decided the common law should be modified and she should be allowed to assert a claim sounding in tort. But this was seven years after the alleged tort was committed. In affirming the judgment for punitive damages, the court is allowing the defendants to be punished for an act which was countenanced by the law when committed. The notion that defendants can be punished for conduct they could not have known beforehand was even actionable frightens me. I would set aside the punitive damages award. *See Hansen v. Harrah's*, 100 Nev. 60, 65, 675 P.2d 394, 395 (1984); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 189-90, 384 N.E.2d 353, 360 (1979); *Brown v. Transcon Lines*, 284 Or. 597, 613-14, 588 P.2d 1087, 1095 (1978); *Nees v. Hocks*, 272 Or. at 221, 536 P.2d at 517.

/s/ Edward H. Nakamura

SUPREME COURT OF HAWAII

No. 8159

EUGENIE PARNAR,
Plaintiff-Appellant,

v.

AMERICANA HOTELS, INC., a Delaware corporation,
FLAGSHIP INTERNATIONAL, INC., a Delaware corporation,
and MARK E. LIQUORI,
Defendants-Appellees.

Oct. 28, 1982

Susan M. Ichinose, Honolulu (Mukai, Ichiki, Raffetto & MacMillan, Honolulu, of counsel), for plaintiff-appellant.

Burnham H. Greeley and Dan T. Kochi, Honolulu (Carlsmith, Carlsmith, Wichman & Case, Honolulu, of counsel) and Roy A. Vitousek, Honolulu(Cades, Schutte, Fleming & Wright, Honolulu, of counsel), for defendants-appellees.

Before RICHARDSON, C.J., and LUM, NAKAMURA, PADGETT and HAYASHI, JJ.

HAYASHI, Justice.

The question raised by this appeal is whether Appellant Eugenie Parnar (hereinafter Parnar), whose con-

tract was of indefinite duration hence terminable at the will of her employers, may sue for damages for an allegedly retaliatory discharge. The lower court held she could not and granted appellees' two motions for summary judgment as to all six counts of Parnar's complaint. Parnar appeals from these orders granting summary judgment and from the lower court's denial of her motion for reconsideration and/or relief from judgment. For the reasons set forth below, we reverse in part and affirm in part the lower court's judgment.

I.

Appellees Americana Hotels, Inc. (hereinafter Americana), and Flagship International, Inc. (hereinafter Flagship) are Delaware corporations doing business in Hawaii. Americana is the managing partner and Flagship is the operator of the Ala Moana Hotel, at which Parnar was employed from August 16, 1972, through October 24, 1975, as secretary to the controller of the hotel. At all times relevant to this action, Appellee Mark E. Liquori (hereinafter Liquori) was the Ala Moana Hotel's controller.

Parnar worked under the supervision of Liquori from March 1975, when Liquori became controller, until her termination by him on October 24, 1975. Parnar's duties included obtaining information from various hotels concerning their average rates and occupancy percentages, exchanging similar information for the Ala Moana Hotel, and tabulating such information for subsequent distribution to and use by the officers and employees of the Ala Moana Hotel and the officers and employees of Americana and Flagship. Parnar participated in the exchange of information upon the instruction of the controller who preceded Liquori. Liquori, upon learning of the practice, authorized its continuation believing that such conduct was lawful.

Sometime prior to September 17, 1975, the Antitrust Division of the United States Department of Justice commenced an investigation into the activities of the owners, operators, and employees of several hotels in the state to determine whether such persons had engaged in anti-competitive practices in violation of the Sherman Antitrust Act. Based upon the results of its investigation, the Antitrust Division obtained criminal indictments against Flagship [1] as well as various hotels.

Parnar was unaware, prior to initiation of the Antitrust Division's investigation, that her exchange of rate and occupancy information might violate the antitrust laws. On September 17, 1975, Parnar was informed by Liquori that she was to meet on September 19, 1975, with an attorney for Americana to discuss her knowledge of the exchanging of rate and occupancy information with other hotels. On September 19, 1975, Liquori told Parnar he would be sitting in on the meeting between Parnar and Allan Van Etten, the hotel's attorney. She requested that she be allowed to meet with Van Etten privately, and Liquori agreed.

Immediately after the meeting with Van Etten, Parnar was called into Liquori's office. The parties' versions of the discussion which ensued differ but both are in agreement that Parnar became distraught during the discussion.

After Parnar's meeting with Van Etten, the relationship between her and Liquori deteriorated. On September 23, 1975, Liquori filed personnel forms to terminate Parnar effective October 24, 1975. The release stated that Parnar was "[u]nable to do a satisfactory job." [2]

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[1] The record is rather unclear but suggests that these proceedings were concluded by an agreement.

[2] Liquori had never previously expressed dissatisfaction with Parnar's work. Throughout her tenure at the hotel, Parnar had received several merit increases.

Parnar was not notified of her termination until October 24, 1975, when she was summarily dismissed by Liquori without severance pay. Liquori suggested that she go home to the mainland because she was having trouble here financially.

Subsequent to her termination, Parnar was interviewed by Department of Justice attorneys regarding her knowledge of possible antitrust violations, but she was not called as a witness in any criminal or civil proceeding related thereto. Appellees had no further contact with Parnar after her dismissal.

On October 24, 1977, Parnar filed a six-count complaint against Liquori, Americana, Flagship, and individual, partnership, and corporate John Does alleging, *inter alia*, that Liquori and a person or persons unknown conspired to discharge Parnar in order to induce her to leave the jurisdiction and prevent her testimony before the grand jury or any subsequent criminal trial and that such discharge was without cause (Count I) and malicious (Count II). Parnar sought special, general, and punitive damages from appellees, jointly and severally.

On September 25, 1979, appellees moved for summary judgment on all counts. At a hearing on October 16, 1979, appellees' motion was granted as to all counts except Count I, the court finding that as an at-will employee, Parnar had no claim for a retaliatory discharge unless her termination was "in violation of law." The court retained jurisdiction of Count I, which it called the "obstruction of justice" claim (despite the existence of another count specifically denominated as such), to permit Parnar additional time to adduce evidence regarding the conspiracy alleged.

On July 23, 1980, appellees moved for summary judgment on Count I, on the grounds that Parnar could show no conspiracy. The motion was heard on July 31, 1980, and granted on August 26, 1980, the court appar-

ently finding no genuine issue of material fact. Parnar's subsequent motion for reconsideration and/or relief from judgment was denied on October 21, 1980.

Parnar contends on appeal that: (1) the lower court erred substantively in finding that she had no cause of action for retaliatory discharge, and that she indeed has a right to sue for a discharge in bad faith or in contravention of public policy; and (2) genuine issues of material fact remained, particularly regarding the motivation for her discharge and the existence of a conspiracy to terminate her.

Appellees assert that assuming the availability of a cause of action for wrongful discharge, either in bad faith or in violation of public policy, Parnar adduced insufficient evidence on those claims to withstand summary judgment.

To properly assess the viability of the parties' claims, we first briefly trace the history of the terminable at-will doctrine.

II.

It is evident from the record that Plaintiff was employed under a contract of indefinite duration. Such an employment contract is typically held to be terminable at the will of either party, for any reason or no reason. 9 S. Williston, Contracts § 1017 (3d ed. 1967); Annot., 51 A.L.R.2d 742 (1957).

Prior to the mid-nineteenth century, the arrangement between an employer and his employee was considered a status-based relationship, wherein the master was responsible for the servant's health, welfare, and security.[3] 1 W. Blackstone, Commentaries *426, noted what was later to become known as the "English rule":

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[3] Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 Harv.L. Rev. 1816, 1824 (1980) (hereinafter cited as *Protecting At Will Employees*).

> If the hiring be general without any particular time limited, the law construes it to be a hiring for a year . . . and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.

By the mid-nineteenth century, however, the protections afforded employees by the imposition of obligations on the employer were repudiated in favor of a more contractarian logic which limited the employer's duties to his employee. Emerging notions of the freedom of contract and of the value of economic growth contributed to the evolution of the at-will doctrine, epitomized by H. Wood's statement in his 1877 Treatise on the Law of Master and Servant at § 134:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed or whatever time the party may serve.

Wood's formulation, known as the "American rule," soon represented the law governing termination of the employer-employee relationship. *See, e.g., Greer v. Arlington Mills Mfg. Co.*, 17 Del. (1 Penne.) 581, 43 A. 609 (Super.Ct.1899); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887); *Martin v. New York Life Ins. Co.* 148 N.Y. 117, 42 N.E. 416 (1895).[4]

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[4] This court embraced the then-prevalent at-will doctrine at an early date by holding that:

> [A] hiring at a certain sum per month, no time being specified, unaccompanied by any facts or circumstances or any proof

By the beginning of the twentieth century, the employer's right to discharge "for good cause, for no cause or even for cause morally wrong"[5] was absolute. In recent years, however, Congress and the legislatures of many states have enacted legislation to protect employees from the whims of employers.[6] Nevertheless, absent a collective bargaining agreement, a contractual provision, or a statutorily-conferred right which reduces the likelihood of abusive or wrongful discharge, the at-will doctrine prevails.[7]

In apparent recognition of the plight of the largely unprotected private sector employee, many state courts have modified or adopted exceptions to the terminable

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> from which a different intention may be inferred, and when the testimony as to the contract is . . . not conflicting, is an employment for an indefinite term and not for a month, and terminable at the will of either party.

Crawford v. Stewart, 25 Haw. 226, 237 (1919).

In *Crawford*, this court was faced with the issue of whether a contract of carriage at the rate of ten dollars per month was terminable at will or terminable only at the end of the month, for the reason that the agreed-upon rate of pay also established the duration of the contract. After acknowledging the English rule, this court opted for Wood's American rule as the more reasonable rule. *Crawford, supra*, at 237. However, nowhere in *Crawford* was the scope of the employer's power to discharge for any or no reason discussed. Thus *Crawford* is for our purposes of historical interest only, although it accurately represents the state of our law on the question expressly decided there.

[5] *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds; Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).

[6] Illustrative of federal regulation of wrongful dismissal is Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2 (1976).

[7] The at-will doctrine has invoked much scholarly examination. The seminal article on the subject is Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum.L.Rev. 1404 (1967).

at-will doctrine by employing two general approaches, one in the nature of contract and the other sounding in tort, to circumvent harsh application of the doctrine.

Contractual relief has been afforded through the "additional consideration" doctrine, in which an employee's provision of consideration in addition to the services to be performed prevents the employer from terminating at will;[8] through implying a promise for employment of a fixed duration from the facts and circumstances surrounding the making of the agreement;[9] and through detrimental reliance.[10] Because none of these grounds of recovery have been urged before the trial court or this court, we intimate no view as to their applicability to this case.

A potentially expansive avenue of contractual modification is the implication of a duty to terminate in good faith. In *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), an employer's discharge of his agent prior to payment of a commission earned by the employee was found to be a termination in bad faith. The court in *Fortune* recognized a general requirement that parties to contracts and commercial transactions act in good faith with one another. *See also Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977).

A similar but more broadly based contractual protection for wrongfully discharged employees was obtained in

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[8] *See, e.g., Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964); *Stauter v. Walnut Grove Products*, 188 N.W.2d 305 (Iowa 1971). *See generally*, Annot, 60 A.L.R.3d 226 (1974).

[9] *See Grauer v. Valve & Primer Corp.*, 47 Ill.App.3d 152, 5 Ill.Dec. 540, 361 N.E.2d 863 (1977); *Delzell v. Pope*, 200 Tenn. 641, 294 S.W.2d 690 (1956).

[10] *See O'Neill v. ARA Services, Inc.*, 457 F.Supp. 182 (E.D.Pa. 1978); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich.App. 254, 283 N.W.2d 713 (1979).

Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). The plaintiff in *Monge* sought to recover damages for breach of her at-will employment contract, alleging that she was terminated for refusing to date her foreman. The New Hampshire Supreme Court found that the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and the public's interest in maintaining a proper balance between the two, and held that:

> [A] termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.

Id. at 133, 316 A.2d at 551.

Parnar urges us to expand a wrongfully discharged employee's rights by imposing upon an employer an implied duty to terminate in good faith, in the manner of *Monge* and *Fortune*. Appellees contend that, even assuming the existence of a contractual action for breach of such a duty in this jurisdiction, Parnar adduced no evidence of bad faith sufficient to withstand the motion for summary judgment. We find it unnecessary to determine whether genuine issues of material fact precluded summary judgment on this claim since we refuse to recognize such a claim.

Like the court in *Monge*, we "cannot ignore the new climate prevailing generally in the relationship of employer and employee." 114 N.H. at 133, 316 A.2d at 551. Nor can we discount the trend to submit the employer's power of discharge to closer judicial scrutiny in appropriate circumstances. But to imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded

that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts. We, therefore, hold that the lower court did not err in granting summary judgment as to Count II, which we construe as the bad-faith discharge claim.

III.

Parnar alternatively urges this court to adopt the "public policy exception" to the at-will rule, wherein an employer is subjected to tort liability if his discharge of an employee contravenes some well-established public policy. She asserts that public policy is violated by discharge of an employee who gives truthful information about an employer's possible antitrust violations. Appellees assert that, if adopted, the public policy exception must be tightly circumscribed and applied only where a discharge violates legislatively-declared public policy. Appellees further assert that the public policy exception is unavailable in the instant case where they claim there was a plausible and legitimate reason for the discharge, i.e., a personality conflict between Parnar and Liquori.

The landmark case on the public policy exception is *Petermann v. International Brotherhood of Teamsters*, 174 Cal.App.2d 184, 344 P.2d 25 (1959). Plaintiff in *Petermann* alleged a discharge for failing to commit perjury before a legislative committee, contrary to his employer's instructions. The District Court of Appeal, after noting that the term "public policy" may comprehend "that which has a tendency to be injurious to the public or against the public good" and "whatever contravenes good morals or any established interests of society," held that since both the commission and subornation of perjury were unlawful,

> in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an un-

> specified duration, when the reason for the dismissal is the employee's refusal to commit perjury. . . . The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury.

Id. at 189, 344 P.2d at 27.

Similarly, the Supreme Court of Indiana, in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), recognized and applied the public policy exception when an employee was retaliatory discharged for filing a workmen's compensation claim. The court found that such a discharge would undermine the act's stated policy of transferring the economic burden of employment-related injuries from the employee to the employer, and would also contravene another statutory provision mandating that "[n]o contract or agreement, written or implied . . . or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act." *Id.* at 252, 297 N.E.2d at 428 (emphasis of the court).[11]

Several courts which have embraced the public policy exception have similarly discerned the relevant public policy from a statute which particularly addressed the employment relationship in some manner or defined (or from which could readily be inferred) the societal interest at stake.[12] In view of the somewhat vague meaning

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[11] For other cases employing the public policy exception where an employee was discharged for filing a workmen's compensation claim, see, *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1979); *Leach v. Lauhoff Grain Co.*, 51 Ill.App.3d 1022, 9 Ill.Dec. 634, 366 N.E.2d 1145 (1977); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

[12] *See, e.g.*, cases cited at note 8 *supra* and *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3rd Cir. 1979) (discharge for refusal to take polygraph test, where statute forbade employers from requiring same); *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d

of the term "public policy," [13] few courts have been inclined to apply the public policy exception absent a violation of statute or clearly defined policy.[14] These decisions manifest a reluctance of courts to unjustifiably intrude on the employment arrangement or to arrogate to themselves the perceived legislative function of declaring public policy.

Because the courts are a proper forum for modification of the judicially created at-will doctrine,[15] it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases. The public policy exception discussed herein represents wise and progressive

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167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (refusal to participate in price-fixing scheme); *Montalvo v. Zamora*, 7 Cal.App.3d 69, 86 Cal.Rptr. 401 (1970) (designating an attorney to represent plaintiff-employee in wage negotiations); *Glenn v. Clearman's Golden Cock Inn*, 192 Cal.App.2d 793, 13 Cal.Rptr. 769 (1961) (engaging in union activity).

[13] The court in *Leach v. Lauhoff Grain Co.*, *supra* note 11, for example, said that public policy was that which "has a tendency to be injurious to the public, or against the public good"; that which relates to good morals, natural justice and matters affecting the citizens of the state generally; or that which is found embodied in the state's constitution, its statutes or, when those are silent on the subject, in the decisions of its courts. 51 Ill.App.3d at 1024, 9 Ill.Dec. 636, 366 N.E.2d at 1147.

[14] *See, e.g., Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977) (refusal to take lie detector tests mandated by company); *Becket v. Welton Becket & Associates*, 39 Cal.App.3d 815, 114 Cal.Rptr. 531 (1974) (filing derivative suit); *Jackson v. Minidoka*, 98 Idaho 330, 563 P.2d 54 (1977) (discharge for unwitting participation in conversion of public corporation's funds); *Rozier v. St. Mary's Hospital*, 88 Ill.App.3d 994, 44 Ill.Dec. 144, 411 N.E.2d 50 (1980) (leaking information to press about hospital employees' conduct toward patients); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (communicating the unsafe nature of employer's products to superiors).

[15] *Protecting At Will Employees*, *supra* note 3, at 1838.

social policy which both addresses the need for greater job security and preserves to the employer sufficient latitude to maintain profitable and efficient business operations. We therefore hold that an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy.[16] In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Of course, the plaintiff alleging a retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy.

In the instant case, we easily discern the relevant public policy from the antitrust laws. The notion that it is the purpose of those laws to protect the public interest in free and unrestrained competition is too well-established to require citation. In fact, section 4 of the Clayton Act [17] was created by Congress to encourage individuals to challenge antitrust violations, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10, 97 S.Ct. 690, 696 n. 10, 50 L.Ed.2d 701 (1977), and has been construed to provide a treble damage remedy for an employee discharged for refusing to participate in an illegal price-fixing scheme. *McNulty v. Borden*,

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[16] We do not reach the issue whether a wrongful discharge gives rise to a cause of action for the intentional infliction of emotional distress. *See Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976).

[17] Sec. 4 of the Clayton Act, codified at 15 U.S.C. § 15 (1914), provides, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . .

Inc., 474 F.Supp. 1111, (E.D.Pa.1979). *See also Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982). These authorities amply evidence that a retaliatory discharge in apparent furtherance of antitrust violations contravenes public policy.

Applying the rule we adopt today, we hold that the trial court erred in granting summary judgment as to Count I. The court erroneously rejected the notion that appellant's discharge might contravene public policy and found no trial-worthy issue of material fact.

Viewing the inferences to be drawn from the materials before the court on appellees' motion for summary judgment in the light most favorable to Parnar as we must on a motion for summary judgment, *Gum v. Nakamura*, 57 Haw. 39, 42, 549 P.2d 471, 474 (1976); *Technicolor, Inc. v. Traeger*, 57 Haw. 113, 118, 551 P.2d 163, 168 (1976), we think there was sufficient dispute to create a question in the mind of the trier as to the existence of the motivation for Parnar's discharge.[18]

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[18] The motivation for Parnar's discharge was seriously cast in doubt by the material's before the lower court. Parnar alleged the following facts: (1) that immediately following her meeting with Van Etten, Liquori called her into his office, told her he had wanted to be present at the meeting to prevent her from saying anything to hurt the hotel, and had tried to make statements on her behalf but "they wouldn't let us"; (2) that on the following day Liquori told her she might be called as a witness before the grand jury, that her testimony might cause the hotel to be heavily fined, that Liquori's superior, Charles Bogdahn, could lose his job, that she appealed her termination to Bogdahn, who said he would discuss it with Liquori and get back to her but did not; (3) that the deposition of Thomas Evans, a former sales director of the Ala Moana Hotel, who was present at a conversation between Liquori and Bogdahn in which Parnar's exchange of rate information was discussed, indicated that while the men did not discuss her termination "there was no question but that the indication was that she was a liability to the hotel," and that this conversation took place at a time when the hotel was trying to prepare a defense to possible antitrust prosecution. Appellees assert that the inference that they would take retaliatory action against Parnar for

That appellees asserted a plausible and legitimate reason for Parnar's discharge should not, in any case, have barred the action from proceeding to trial for the jury's determination of the factual issue of motivation which, in an action for retaliatory discharge, is always material. Summary judgment under these circumstances was therefore improper since, as stated many times by this court, summary judgment is proper only where there is no genuine issue as to any material fact and the movants clearly indicate they are entitled to judgment as a matter of law. *Molokai Homesteaders Coop. Assn. v. Cobb*, 63 Haw. 453, 458, 629 P.2d 1134, 1139 (1981); *City and County v. Toyama*, 61 Haw. 156, 158, 598 P.2d 168, 170-71 (1979); *Hunt v. Chang*, 60 Haw. 608, 618, 594 P.2d 118, 124 (1979).

We, therefore, reverse the lower court's judgment as to Count I and remand for further proceedings consistent with this opinion. Parnar has sufficiently alleged a retaliatory discharge in contravention of public policy such that she should be allowed to proceed against the appellees individually. Appellees are not thereby prejudiced where the gist of this action has at all times been a retaliatory discharge.

Parnar's contentions regarding Counts II through VI are, however, without merit. Accordingly, we affirm the lower court's grant of summary judgment as to those counts.

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speaking with their own counsel is absurd and "illogical." We can only say, however, that Liquori's statement to Parnar, if true, belie such a cavalier attitude.

Furthermore, Liquori stated in affidavit and deposition that there was a personality conflict that made it impossible to work with Parnar. The release form authorized by him, however, stated that she was "unable to do a satisfactory job." Parnar stated by affidavit that on the effective date of discharge Liquori told her that her work was satisfactory. By deposition, Parnar stated that she and Liquori had a good professional relationship and that on the date of her discharge Liquori admitted that the antitrust investigation was "partly" the cause of her termination.

IN THE SUPREME COURT
OF THE STATE OF HAWAII

No. 12387

Civ. No. 52878

EUGENIE PARNAR,
Plaintiff-Appellee/
Cross-Appellant,

vs.

AMERICANA HOTELS, INC., a Delaware corporation,
FLAGSHIP INTERNATIONAL, INC., a Delaware corporation,
and MARK E. LIQUORI,
Defendants-Appellants/
Cross-Appellees,

and

JOHN DOES 1 THRU 25,
JANE DOES 1 THRU 25,
DOE CORPORATIONS 1 THRU 25,
DOE PARTNERSHIPS 1 THRU 25,
Defendants.

MOTION FOR RECONSIDERATION

ORDER DENYING RECONSIDERATION

Defendants-Appellants/Cross-Appellees' motion for reconsideration filed on August 26, 1988 is hereby denied.

Associate Justice Nakamura having dissented from the memorandum opinion does not concur.

DATED: Honolulu, Hawaii, September 2, 1988.

Burnham H. Greeley
(Richard J. Kowen and
James H. Hershey) on the
motion

/s/ Herman Lum

/s/ Frank D. Padgett

/s/ Yashimi Hayashi

/s/ James Waketsuki

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-903

In The
Supreme Court of the United States
October Term, 1988

AMERICANA HOTELS, INC.,
FLAGSHIP INTERNATIONAL, INC.,
and MARK E. LIQUORI,
Petitioners,

v.

EUGENIE PARNAR,
Respondent.

BRIEF OF RESPONDENT, EUGENIE PARNAR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a punitive damages award based upon the Petitioners' unlawful and illegal discharge of the Respondent violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution?

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v.

EUGENIE PARNAR,

Respondent.

BRIEF OF RESPONDENT, EUGENIE PARNAR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Supreme Court of Hawaii is unreported, but is reprinted in Petitioners' Appendix ("Pet. App."), commencing at page 1a. The Order Denying Motion for Reconsideration is reprinted in Pet. App., commencing at page 34a.

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on August 17, 1988, and the Petition For Certiorari, invoking 28 U.S.C. § 1257(3) as the basis for review, was timely filed on December 1, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article I, Section 12 of the Hawaii State Constitution provides in relevant part that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

COUNTER STATEMENT OF THE CASE

I. Nature of The Case

This case presents the issue of whether an award of punitive damages based upon an unlawful and illegal discharge of an employee violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. As Petitioners have acknowledged, the Court in *Bankers Life and Casualty Company v. Crenshaw*, — U.S. —, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) had the issue before it, but declined to decide the issue. Likewise, it is not prudent for the Court to address the Federal Constitutional issue in this case since the punitive damages award was not established below as excessive.

II. Statement of Facts

A comprehensive review of pertinent facts will expose Petitioners' claim that the punitive damages award violated the Excessive Fines Clause of the Eighth Amendment as being groundless under the circumstances.

From August 16, 1972 through October 24, 1975, Eugenie Parnar (hereinafter "Respondent") was employed at the Ala Moana Hotel (hereinafter "The Hotel") as a secretary to the controller of the hotel. Petitioner Americana Hotels, Inc., (hereinafter "Americana"), was the managing partner of the Hotel and Petitioner Flagship International, Inc., (hereinafter "Flagship"), a subsidiary of American Airlines, was the operator of the Hotel.

From March of 1975 through October 24, 1975, Petitioner Mark Liquori, (hereinafter "Liquori"), was the controller of the Hotel and the supervisor of Respondent. Respondent's duties included obtaining rate and occupancy information from other hotels for the use of the employees and officers of the Petitioners.

The facts of this case are summarized in the Court's decision in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 371-3 and 381, 652 P.2d 625 n.18 (1982).

The hotel industry in Hawaii in the early 1970's conspired to exchange inside rate and occupancy information. When Respondent began work at the Hotel there was an existing practice between competitor hotels of exchanging inside information each month. The exchange continued until Petitioners were told by their New York corporate office to stop the practice after the United States Department of Justice began its antitrust investigation.

At the direction of each of her supervisors, from 1972-1975, part of Respondent's duties as secretary to the Controller of the Hotel was to continually exchange inside occupancy and rate information each month with competitor hotels in Waikiki. This included the "actual rates and published rates and the internal figures that are computed within the hotel." This information was dissem-

inated not only to the Hotel General Manager, and Director of Rooms, but also telexed to the New York corporate office. The information was given to the New York Vice President of Finance and other executives who would use it during Americana's annual forecast meetings. The information was used "to manipulate their figures so they could get their forecast down to make a profit." Respondent did not realize that anything she had done with respect to exchanging rate and occupancy information was wrong or illegal until Liquori stopped her from exchanging information and told her that the practice was what the United States Department of Justice was "investigating".

Prior to Respondent's termination, Americana became the subject of a criminal antitrust investigation by the United States Department of Justice. Liquori was aware of this before he came to Hawaii in 1975 and took it upon himself to become familiar with the antitrust laws.

Liquori testified that he told Bogdahn, the general manager of the Hotel and group vice-president of Americana, that the exchange of inside information "might appear to be" illegal. Bogdahn testified that *"I really didn't . . . think it [the exchange of information] was illegal until our corporate people said, 'If you're doing anything in that area, stop.'"* (*emphasis added*).

As Tookie Evans, the Americana Director of Sales in 1975 testified:

> "Mr. Bogdahn had advised many of the department heads, including myself, that there was apparently an antitrust investigation going on, looking into the business of possible rate fixing, I guess, amongst the hotels. And he had cautioned us at that point to stop discussing rates or occupancy with any of the hotels."

In September 1975, Liquori told Respondent that she was to meet with an attorney "regarding the exchange of rates and occupancy percentages." Liquori failed to inform Respondent who the attorney represented. Because Respondent had never previously met with an attorney and thought she might have been involved in criminal activity, she was very frightened.

Before the meeting, Respondent did not know that Liquori intended to sit in the meeting with her. On the day of the meeting, Respondent told Liquori she wanted to meet with the attorney alone. Respondent was afraid Liquori would challenge what she said to the attorney. Respondent was also concerned that Liquori twice stated that Bogdahn said he "didn't know anything about the exchange of rates", which indicated to her that Liquori was "covering for Bogdahn" in order to "make [her] the scapegoat". Respondent had given Bogdahn the rates all through her tenure at the Hotel.

When Respondent met with the attorney, she became concerned about her job when he told her, "You won't lose your job over this, at least I don't think." When the attorney told Respondent that he would type her statement to sign, "[she] became very afraid," thinking he might have been a "federal attorney." She thought she might be imprisoned for violating the antitrust laws. She "didn't know if someone was going to be waiting outside to take [her] away or whatever." She feared that "somebody would slap handcuffs on [her] when [she] walked out of there" because "you're not talking at an ordinary meeting . . . , you're talking federal, antitrust violations and you're talking prosecution". She feared her family would be disgraced.

Immediately after the meeting, Liquori called Respondent to his office, was very angry, and told Respondent he wanted to be in the room *to prevent her from "[saying] something to hurt the hotel."* (*emphasis added*). On the following Monday when Respondent tried to communicate with Liquori to find out what the problem was, he told her "I know we can't work with you anymore." When she asked "why?", he responded, "Did you ever hear about Rosemary Woods?".

When Respondent asked Liquori how heavily she was involved in the antitrust investigation, he told her she was "a key witness", that people were going to jail and that the Hotel could be heavily fined:

> [H]e told me that I was a key witness in the antitrust investigation . . . that my testimony could cause the hotel to be heavily fined and Mr. Bogdahn could lose his job.
>
> He said the food and beverage was caught for price fixing. *People are put in jail for things like that. We had tried to maybe settle on your behalf but they wouldn't let us.*

(*emphasis added*).

Liquori also told Respondent that "the Ford Administration was cracking down on price fixing and that people were put in jail for such things as this." According to antitrust expert, attorney Jerrold Guben, President Ford gave the antitrust division of the Department of Justice greater power and independence to prosecute antitrust violations.

During her employment, Liquori also suggested that Respondent obtain inside information from the Outrigger Hotels, a competitor, in a way that strongly indicated that the Hotel wanted her to get the information surreptitious-

ly. Liquori knew that Respondent worked there part time and told her that his boss, Mr. Bogdahn, wanted her to get the Outrigger figures. Liquori obviously intended to pressure his subordinate to get the information. Respondent's refusal to breach a confidence in furtherance of Petitioners' illegal antitrust activities was also part of the reason Liquori fired her. Liquori first tried to give Respondent money and offered to find her a job on the mainland. Then he told her "You won't find work here." When the Respondent asked if the termination had anything to do with the antitrust investigation, Liquori responded, "Partly."

Tookie Evans, Americana Director of Sales, testified that he overheard a conversation between Liquori and Bogdahn in which Respondent's continued exchange of information was described as "a liability" to the Hotel because of the criminal investigation. Mr. Evans knew that a criminal antitrust investigation was directed against the Hotel and that the consequences of that investigation was "bad news".

Tookie Evans recalled a conversation between Liquori and Bogdahn in which Respondent was described as a liability to the Hotel:

> Q. What was your impression as a result of that meeting?
>
> A. My impression was that *we had probably created a liability for ourselves,* in effect, that someone [Respondent] was continuing to do something which would possibly in the long run provide information for the [antitrust] investigation that was going on."
>
> Q. Were you aware back then what the consequences [of a criminal antitrust investigation] would be, generally?

A. Generally, you know, it would be bad news. Antitrust investigation is the federals after all.

Q. Criminal investigation.

A. Right.

(*emphasis edded*).

Melissa Fontes, the Director of Personnel of the Hotel, testified that the Hotel followed union policies in each and every instance of discipline and termination of employees, including non-union employees. The Hotel followed progressive discipline procedures, such as warnings and advance notices before terminating employees. It also transferred them to other positions as an alternative to termination. These options in the testimony of Liquori, did "not cross my mind." Plaintiff was never given an alternative to termination.

According to Melissa Fontes, the Hotel, in terminating Respondent, violated its own established union-like policies and practices of fair treatment of non-contract, at will employees:

> "I didn't feel that I could approach Mark [Liquori]. I felt it was a finality, and basically because I didn't know the details of the antitrust story . . . I think, I thought, well this is bigger than just the personnel end of it . . . And I do believe that I sensed you know, the whole project was bigger than all of us. I mean, the antitrust thing was so crucial at the time and so delicate a subject that I do believe at the time too I let that affect me in terms of that this is bigger and would I be interfering with the system?"

The jury reasonably concluded, as did the Hawaii Supreme Court in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 381 n.18, 752 P.2d 625 (1982), that Liquori gave inconsistent reasons for her discharge. Testimony at trial

and her records showed only positive recommendations, evaluations and merit increases, and revealed no problems existed until the antitrust matter focused on her involvement in September of 1975, which resulted in her firing the following month. Petitioners believed that the exchange of information was illegal, pled *nolo contendere* to antitrust violations, and subjectively feared Respondent's testimony.

On October 24, 1977, Respondent filed a complaint which alleged, *inter alia*, that Liquori and others conspired to discharge Respondent in order to induce her to leave the jurisdiction and prevent her testimony before the grand jury or any subsequent criminal trial and that such discharge was without cause and malicious. Respondent sought special, general, and punitive damages from Petitioners, jointly and severally.

After the trial court granted summary judgment on her complaint, Respondent appealed to the Hawaii Supreme Court. The Hawaii Supreme Court reversed and remanded the case and held that "an employer may be held liable in tort where his dicharge of an employee violates a clear mandate of public policy". *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625 (1982) Pet. App. "A", commencing at page 19a.

On remand and at the conclusion of the trial on Respondent's cause of action, the jury found that Petitioners fired Respondent to prevent her from testifying in an attempt to thwart an antitrust investigation and awarded her $300,000 in actual damages, $275,000 for emotional distress and $1,500,000 in punitive damages. The lower court instructed the jury that:

> A clear mandate of public policy is violated when an employee's discharge is motivated by the employer's intent to prevent her from being a witness in an antitrust investigation.
>
> If you find that defendants fired plaintiff to prevent her from being a witness in an antitrust investigation, then defendants violated the clear mandate of public policy.

In response, the jury found that Plaintiff's discharge violated a clear mandate of public policy. Special Verdict Answer #1. Petitioners' Motion for New Trial and Motion Notwithstanding The Verdict were denied on August 13, 1987.

On August 18, 1987, Petitioners filed their Notice of Appeal in the Hawaii Supreme Court. In its Opening Brief, Petitioners cited both the Eighth Amendment of the United States Constitution as well as Act 1, Sec. 12 of the Constitution of the State of Hawaii, but failed to adequately inform the state appellate court of the basis for their assertion that the jury verdict violated the aforesaid Federal Constitutional principles.

On August 17, 1988, the Supreme Court of Hawaii affirmed the trial court decision and did not pass upon the Federal Constitutional issues raised before this Honorable Court in this instant petition. Pet. App. "A", commencing at page 1a. Justice Nakamura dissented and addressed the excessive fines issue, *sua sponte*, but focused his dissent on the *ex post facto* nature of the award as well as other evidentiary issues.

On August 26, 1988, Petitioners filed their Motion For Reconsideration of the Memorandum Opinion entered by the Hawaii Supreme Court on August 17, 1988. The

Hawaii Supreme Court entered its Order Denying Motion For Reconsideration on September 2, 1988.

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REASONS FOR DENYING THE WRIT

I. Petitioners Failed To Preserve Their Constitutional Challenge In Their Appeal To The Hawaii Supreme Court

This Court has consistently held that it will not decide Federal Constitutional questions not presented nor decided in the highest court of the state. *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).[1]

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[1]In *Banker's Life, supra,* the Petitioner, in its motion for rehearing to the Mississippi Supreme Court, raised for the first time its claim that the punitive damage award violated the Excessive Fines, Due Process and Contract clauses of the Federal Constitution. In *Webb v. Webb, supra* 451 U.S., at 499, this Court stated that principles of comity which support the "not pressed or passed upon below" rule requires that the state courts be afforded the opportunity to perform their duty, which includes . . . "construing and applying the applicable federal requirements". The Court also cited practical reasons supporting the "not pressed or passed on rule" including, (a) "affording the parties the opportunity to develop the record necessary for adjudicating the issue"; (b) insuring that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner; and (c) allowing the issues to be adjudicated in the state courts where necessary to dispose of the case which may eliminate the necessity of a subsequent adjudication by this Court. In *Taylor v. Illinois,* — U.S. —, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), the Petitioner failed to specifically articulate his claim based upon the Compulsory Process clause until he filed his petition for rehearing. However, the Petitioner cited and relied upon two opinions of this Court based upon Compulsory Clause claims. The Court concluded that the Petitioner's citation to authority referring to the Constitutional violation and the state appellate court's understanding of the Federal Constitutional question sufficiently presented the issue to the state court to support this Court's jurisdiction.

"At a minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* 451 U.S., at 501. With respect to the Constitutional issue raised in this proceeding, the Court in its October 1987 term held that "[a] vague appeal to constitutional principles does not preserve appellant's [federal constitutional] claim." *Bankers Life and Casualty Company v. Crenshaw, supra* 108 S.Ct., at 1650. This Court reaffirmed its policy to decline review of a petitioner's claims where the "petitioner generally invok[es] the Constitution in state court and await[s] review in this Court to specify the constitutional provision it is relying upon." *Id.* 108 S.Ct., at 1650. Here, Petitioners failed to argue the basis upon which they assert the punitive damages award was excessive. Where the decision of the state court does not discuss the Federal Constitutional issue, the omission will be assumed to be due to the want of proper presentation in the state courts, unless the Petitioner can affirmatively show to the contrary. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 183, 103 S.Ct. 2296, 2301, 76 L.Ed.2d 498 (1983).

Petitioners herein contend that they properly raised the issue of whether the award of punitive damages violated the Eighth Amendment before the Hawaii Supreme Court. However, Petitioners failed to adequately brief the Federal Constitutional issue in their appeal to the Hawaii Supreme Court and relied on their argument that the award of punitive damages was excessive based generally upon the facts presented at trial, the assets of the

defendant and the conduct of the defendant.[2] In addition, in their Motion For Reconsideration, the Petitioners' failed to again specifically raise the Eighth Amendment Issue.[3] The Petitioners' vague and conclusory contentions that the punitive damages award was an excessive fine, without demonstrating the reasons therefore, (*i.e.* inability to pay), failed to apprise the Hawaii Supreme Court that the $1.5 million punitive damages award was disproportionate on its face. More importantly, the Hawaii

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[2]In their opening brief, Petitioners' argument on the Constitutional issue raised herein was limited to the conclusory statement that, "[t]he imposition of excessive and unreasonable punitive damages violates Defendants' Constitutional right against excessive fines. Constitution of the State of Hawaii, Section 12; United States Constitution, Eighth Amendment." Petitioners failed to assert their Federal Constitutional argument in their statement of questions presented to the Hawaii Supreme Court. Pursuant to Rule 3(b)(3) of the Rules of the Supreme Court of the State of Hawaii, issues not contained within the statement of questions presented will be disregarded. *Kang v. Harrington,* 59 Haw. 652, 656, 587 P.2d 285, 288 (1978) n. 1. Since the Hawaii Supreme Court's opinion did not address the Constitutional issue, the judgment might have rested upon a non-federal ground. *Stembridge v. Georgia,* 343 U.S. 541, 547, 72 S.Ct. 834, 96 L.Ed. 1130 (1952); *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1892, 68 L.Ed.2d 392, 398 (1981) n. 4.

[3]Petitioners argued in the reconsideration memorandum that, "[h]owever, the most serious issue with respect to punitive damages overlooked by the Memorandum Opinion is the violation of fundamental notions of due process by the imposition of such an excessive fine. At the time of the termination the common law in the State of Hawaii imposed no liability for the Defendants' actions. *Not until seven years later was even a cause of action created.* To then impose a $1,500,000.00 fine on Defendants for actions they had no reason to suspect were going to be deemed actionable is a grossly unfair application of *ex post facto* punishment. Such a fine violates every notion of due process and fundamental fairness embodied in both the Hawaii and the United States Constitutions."

Constitution also contains an Excessive Fines Clause. Hawaii Const. Art. 1, § 12.

Furthermore, this Court recognized the policy in favor of allowing a state legislature or state court to establish a less intrusive resolution of the controversy. *Bankers Life, supra* 108 S.Ct., at 1651. The Hawaii Supreme Court was in a position to adequately deal with the question of excessive fines. Petitioners simply failed to adequately present the Excessive Fines issue based upon the Eighth Amendment to the Federal Constitution to the Hawaii Supreme Court and have failed to preserve the Federal Constitutional issue for consideration by this Honorable Court. Petitioners have thus failed to sustain their burden of affirmatively showing that they properly presented the Eighth Amendment issue to the Hawaii Supreme Court.

II. The Punitive Damages Award Below Does Not Violate The Excessive Fines Clause Of The Eighth Amendment

Petitioners contend that the punitive damages award herein is excessive under the Eighth Amendment of the Federal Constitution based upon four factors which are determinative of the issue: the objective of punitive damages in this case, the importance of the public interest protected, the circumstances of the act and the ability of Petitioners to pay the award.

Hawaii case law has consistently recognized the propriety of an award of punitive damages where the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. *Bright v. Quinn*, 20 Haw. 504, 512 (1911); *citing, Lake Shore & Michigan Southern Rail-*

way Co. v. Prentice, 147 U.S. 101, 107, 13 S.Ct. 261, 37 L.Ed. 97 (1892). More importantly, several Hawaii cases awarding punitive damages focus upon the defendant's state of mind in determining whether an award of punitive damages is appropriate. *Quedding v. Arisumi Brothers, Inc.,* 66 Haw. 335, 661 P.2d 706 (1983) (wanton or reckless breach of construction contract); *Hall v. American Airlines,* 1 Haw.App. 312, 617 P.2d 1240 (1980) (fraudulent scheme).

Petitioners assert that since the cause of action for wrongful termination was not established as of the date of their wrongful conduct, they should not be liable for punitive damages based upon the Ex Post Facto and Due Process clauses of the Fifth Amendment to the Constitution. An *ex post facto* law has been defined by this Court as one that makes an action done before the passing of the law, which was *innocent* when done criminal; and punishes such action, or that *aggravates* a *crime,* or makes it *greater* than it was when committed. *Bouie v. City of Columbia,* 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964). The Petitioners' conduct certainly amounted to conduct contrary to public policy as expressed by existing statute and court rules.

It is a violation to engage in conduct "with the intent to . . . cause or induce any person to . . . withhold testimony . . . or . . . hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a federal offense . . ." 18 U.S.C. § 1512. *U.S. v. Murray,* 751 F.2d 1528, 1534 (9th Cir. 1985), *cert. denied* 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985) (Defendant convicted of instructing a witness not to testify and to give false testimony). Hawaii Revised Statutes §§ 710-1071 and 710-

1072 expressly makes it an offense where a person intimidates and/or tampers with a witness.[4]

Moreover, firing an employee to thwart an investigation is so fundamentally wrong and a per se violation of the law that it need not await action by a state appellate court to establish it as a wrong. An attempt to conceal a witness to frustrate or defeat an investigation is tantamount to an obstruction of justice and strikes at the very heart of our judicial system. The aforesaid statutes were effective at the time of Petitioners conduct. Petitioners' conduct violated a firmly established public policy which is the backbone of our judicial system. The punitive damages award therefore was proper under the circumstances since Petitioners knew or should have known that their conduct violated an important and established public policy and thus did not amount to an *ex post facto* punishment. The punitive damages award therefore satisfies the objective of upholding the important public policies which are at the root of various obstruction of justice statutes and antitrust prohibitions. The punitive damages award resulted from Petitioners' efforts to conceal and cover-up

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[4]Hawaii Revised Statutes § 710-1071 provides, in relevant part, that: [a] person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding, with intent to: (a) Influence the testimony of that person; (b) Induce that person to avoid legal process summoning him to testify; or (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned. Hawaii Revised Statutes § 710-1072 provides, in relevant part, that: [a] person commits the offense of tampering with a witness if he intentionally engages in conduct to induce a witness . . . to: (a) Testify falsely or withhold any testimony which he is not privileged to withhold; or (b) Absent himself from any official proceeding to which he has been legally summoned.

their conduct, to thwart an antitrust investigation, and damage and denigrate the judicial process. The jury spoke in a loud voice and sent a message that such conduct will not be tolerated.

Petitioners also argue that the remedy of punitive damages in this case is duplicative of other statutory prohibitions which effectively deter Petitioners and other like employers similarly situated from wrongfully discharging their employees based upon the employee's possible participation in a governmental investigation. Although the Petitioners recognize that Section 4 of the Clayton Act provides a remedy to discharged employees, there was no award in favor of Respondent based upon said statutory violations. In ruling that *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), *vacated* 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983), *on remand* 740 F.2d 739 (9th Cir. 1984), *cert. dismissed* 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985), would not be followed in Hawaii, the trial court prevented Parnar from seeking treble damages under the Clayton Act. Therefore, an award of punitive damages was the only remedy available to the jury to address the Petitioners' egregious and malicious conduct. Thus, if Petitioners are not held liable for punitive damages as provided by the judgment, their malicious, oppressive and illegal conduct would go unpunished.

Petitioners finally argue for the first time that the punitive damages award was overly burdensome, given their stipulated net worth. The relationship of net worth to the amount of punitive damages is only one circumstance to consider in determining excessive damages, the circumstances of Petitioners' conduct must also be con-

sidered. An award of punitive damages is not considered excessive as long as it punishes the wrongdoer without causing financial ruin. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985), *cert. denied* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986).[5] Petitioners failed to introduce any evidence at trial or at any hearing regarding their inability to pay an award of punitive damages and also failed to argue the issue of their inability to pay on appeal. The record thus fails to demonstrate that the award is disproportionate to the economic resources of the Petitioners. Moreover, Petitioners' ability to post a $2.3 million supercedeous bond suggests that Petitioners are certainly not impecunious.

The Petitioners' citation to other punitive damage awards in this jurisdiction disregards the established rule that each case turns on its own facts including the Defendant's state of mind and degree of malice, oppression and gross negligence which forms the basis for the award. *Kang v. Harrington*, 59 Haw. 652, 587 P.2d 285 (1978). Here, there was ample evidence before the jury of Petitioners' malicious and oppressive conduct to justify the amount of punitive damages awarded.

The award of punitive damages entered in the trial court and affirmed by the Hawaii Supreme Court is proper under the circumstances and is not overburdensome or disproportionate and therefore does not violate the Excessive Fines Clause of the Eighth Amendment.

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[5]In *People v. Ingham*, 115 Misc.2d 64, 453 N.Y.S.2d 325 (1982), a case cited by Petitioners herein, the defendant, who had pled guilty to a charge of driving while under the influence of alcohol, introduced testimony at an ability to pay hearing that she had no discretionary income and lived at subpoverty levels.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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No. 88-903

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., and MARK E. LIQUORI,
Petitioners,

v.

EUGENIE PARNAR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

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PETITIONERS' REPLY BRIEF

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v.

EUGENIE PARNAR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITIONERS' REPLY BRIEF

This Brief is, in part, a Supplemental Brief filed pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States and, in part, a Reply Brief filed pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States.

I. The Court Should Defer Considering The Petition For A Writ Of Certiorari Pending Its Decision In *Browning-Ferris Industries of Vermont, et al. v. Kelco Disposal, Inc., et al.*, No. 88-557.

On December 5, 1988, the Court granted certiorari in *Browning-Ferris Industries of Vermont, et al. v. Kelco Disposal, Inc., et al.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (December 5, 1988) (No. 88-556) on the issue of "[w]hether an award of $6,000,000 in punitive damages, amounting to more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise." The fundamental question of whether the Excessive Fines Clause of the Eighth Amendment applies to and limits punitive damages awards in civil actions un-

derlies the question presented in *Browning-Ferris*. The same fundamental question is presented in the Petition for a Writ of Certiorari filed by Petitioners. Therefore, the Court can preserve judicial resources by holding this Petition for consideration pending a decision in *Browning-Ferris*.[1]

II. The Petitioners' Constitutional Argument Was Properly Presented To The State Supreme Court And The State Court's Decision Necessarily Rested On Federal Constitutional Grounds.

The Respondent argues that the Petitioners failed to assert their constitutional argument in the statement of questions presented in their Opening Brief on Appeal and that, as a result, the issue was disregarded by the Supreme Court of Hawaii in compliance with Rule 3(b)(3) of the Rules of the Supreme Court of the State of Hawaii. The Respondent cites *Kang v. Harrington*, 59 Haw. 652, 656, 587 P.2d 285, 288 n. 1 (1978) in support of that argument (*See* Respondent's Brief in Opposition at page 13, n. 2). Respondent apparently relied

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[1] There are two additional Petitions for Certiorari pending which present the issue of whether the Eighth Amendment Excessive Fines Clause applies to punitive damages. *Metromedia, Inc. v. April Enterprises, Inc.*, No. B022890, *slip op.* (Cal. Ct. App. June 9, 1988), *petition for cert. filed*, No. 88-625 (October 14, 1988); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *petition for cert. filed*, No. 88-626 (October 14, 1988). In addition, a Petition for Certiorari is pending in *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *petition for cert. filed*, No. 88-855 (November 23, 1988). In that case the Court is asked whether the Eighth Amendment Excessive Fines Clause applies to civil contempt sanctions. Thus, it raises the same fundamental question of whether the Eighth Amendment Excessive Fines Clause applies in civil proceedings. Petitioners assume that the Court will hold all of these cases pending its decision in *Browning-Ferris*.

On January 23, 1989, the Court denied cert. in *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987), *cert. denied*, 57 U.S.L.W. —— (U.S. Daily Edition January 25, 1989) (No. 88-157). That case, *inter alia*, raised the issue of whether a punitive damages award violated the Eighth Amendment. This case is distinguishable from *Nationwide* because in *Nationwide* the Eighth Amendment issue was first raised in a Petition for Certiorari.

on the statement of Rule 3(b)(3) quoted in *Kang*. When the Petitioners appealed this case to the Supreme Court of Hawaii on August 18, 1987, Rule 3(b)(3) was no longer in existence. Effective June 1, 1984, portions of the Rules of the Supreme Court of the State of Hawaii, including Rule 3(b)(3), were deleted and superseded by the Hawaii Rules of Appellate Procedure and the Petitioners, therefore, were subject to the Hawaii Rules of Appellate Procedure.

Rule 28(b)(6) of the Hawaii Rules of Appellate Procedure requires that an opening brief on appeal include a statement of questions presented and, like its predecessor Rule 3(b)(3), states that questions not presented will be disregarded.[2] Rule 28(b)(6) also states, however, that "the statement of a question will be deemed to include every subsidiary question fairly comprised therein" and requires that questions be set forth "in the most general terms possible." Haw. R. App. P. 28(b)(6). The Petitioners' statement of questions presented in their Opening Brief on Appeal included the following question:

> [d]id the trial Court err in not granting a new trial given an unreasonable and unwarranted verdict rendered by the jury which indicated a decision based upon passion, sympathy and prejudice . . . .

The question generally raised the issue of whether the punitive damages award, as one element of the jury verdict, was "unreasonable and unwarranted." Whether the award was constitutionally excessive was discussed as a subsidiary question in the Petitioners' Opening Brief on Appeal and was fairly comprised within the question presented. Petitioners have satisfied Rule 28 and, there-

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[2] Hawaiian courts have not strictly enforced Rule 28. *See Bow v. Nakamura*, 719 P.2d 1103 (Haw. Ct. App. 1986) (The court noted that plaintiff's brief violated Rule 28 because it failed to quote challenged findings of fact but, because the plaintiff's argument clearly indicated what findings were challenged, the court did not disregard the challenges pursuant to Rule 28 but decided the issues presented).

fore. Respondent's argument that the constitutional issue may have been disregarded pursuant to Rule 3(b)(3) fails.

III. The Respondent Has Misconstrued Petitioners' Arguments Regarding The Excessiveness Of The Punitive Damages Award.

Respondent's argument regarding the appropriateness of punitive damages awards in cases involving wanton or oppressive conduct is largely irrelevant. Even though Petitioners do not believe their conduct was either "wanton or oppressive", they have not contested the appropriateness of an award of punitive damages in the proceedings before this Court. Instead, the Petitioners herein challenge *the amount* of the award. In addition, Respondent's arguments warrant some reply.

First, in order that the record before the Court be accurate, Petitioners note that the Respondent has cited *Hall v. American Airlines, Inc.*, 1 Haw. App. 258, 1 Haw. App. 312, 617 P.2d 1230 (1980) and *Quedding v. Arisumi Bros., Inc.*, 66 Haw. 355, 661 P.2d 706 (1983) for the proposition that "Hawaii cases awarding punitive damages focus on the defendant's state of mind" (*See* Respondent's Brief in Opposition, at p. 15). The courts in *Hall* and *Quedding*, however, did not award punitive damages. In each case the court concluded that there was insufficient evidence to support a conclusion that the parties had engaged in wanton or reckless behavior.

Second, Respondent accurately notes that the Petitioners have not introduced evidence regarding their inability to pay the punitive damages award. That point is, however, irrelevant. Petitioners conceded that they are able to pay the award (*See* Petitioners' Petition for a Writ of Certiorari, at p. 19). Contrary to Respondent's argument, the fact that they are able to pay the award does not foreclose a conclusion that the award is disproportionate to their economic resources. Although courts have considered the ability of a party to pay an

award of punitive damages as a factor in assessing the excessiveness of an award, they have also concluded that a fine is excessive if it is disproportionate to the economic resources of even a wealthy defendant. *People v. Ingham*, 115 Misc. 2d 64, 453 N.Y.S.2d 325, 328 (N.Y. Crim. Ct. 1982). Obviously any fine is disproportionate to the resources of a defendant who has no resources. All defendants, however, are protected by the Eighth Amendment Excessive Fines Clause from fines that exact a disproportionate amount of their resources. The parties stipulated to the Petitioners' net worth and the punitive damages awarded in this case represents 15% of the Petitioners' stipulated net worth.[3] Regardless of whether the Petitioners can pay that amount, the punitive damages award clearly exacts a disproportionate amount of their net worth.

Finally, the Respondent argues that the cases cited by Petitioners to demonstrate that the punitive damages award in this case is excessive, when compared to punitive damages awarded in more egregious situations, are irrelevant because each case must turn on its own facts (*See* Petitioners' Petition for a Writ of Certiorari, at p. 20 and Respondent's Brief in Opposition, at p. 18). Petitioners agree that a punitive damages award must be related to the facts of a case. An award of punitive damages, however, cannot be evaluated in a vacuum. The

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[3] It is interesting to note that the punitive damages award challenged in *Browning-Ferris* comprised only .6% of Browning-Ferris' net worth (*See* Petition filed in *Browning-Ferris*, at p. 29). Thus the award at issue here represents a far greater proportion of the Petitioners' net worth than that at issue in *Browning-Ferris*. In addition, the Respondent cites *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986) for the proposition that a punitive damages award is only excessive if it cannot be paid. Respondent neglects, however, to note that in *Transgo*, the court concluded that awards of 5% and 2.5% of the parties' net worths were not excessive. The court was not dealing with a case involving 15% of a party's net worth which is at issue here.

facts must be compared to the facts of other cases in which punitive damages have been assessed and the amount of the award compared to damages awarded in similar circumstances. *See Solem v. Helm*, 463 U.S. 277, 291 (1983) (considering excessiveness of a criminal punishment under the Cruel and Unusual Punishments Clause of the Eighth Amendment); *Sizemore v. Commonwealth*, 485 S.W.2d 498, 500 (Ky. 1972).

The cases cited in Petitioners' Petition for a Writ of Certiorari demonstrate that the Petitioners' actions in this case were much less egregious than those of other individuals subjected to punitive damages, but that the punitive damages awarded far exceeded the damages awarded in the more egregious cases.

CONCLUSION

The Petitioners respectfully suggest that the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of Hawaii be held pending the Court's decision in *Browning-Ferris*.

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